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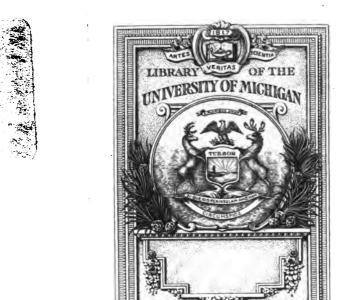
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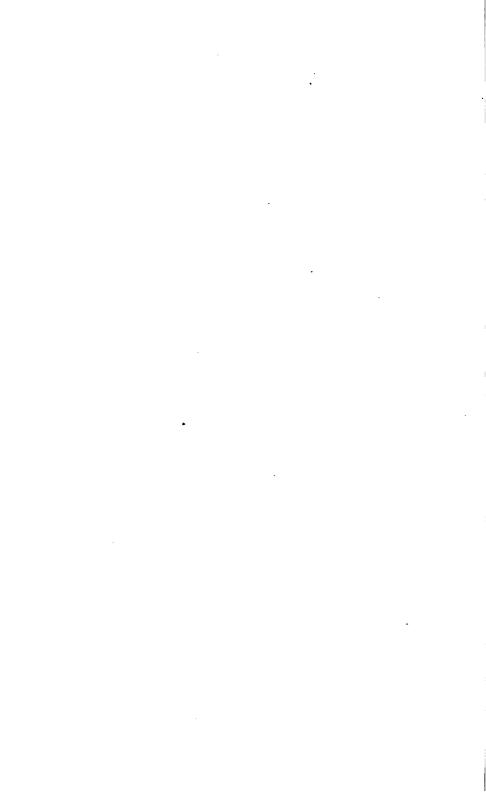
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WTH OF ENGLISH LAW.



# $\begin{array}{c} & \text{ THE } \\ \text{GROWTH OF ENGLISH LAW.} \end{array}$

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## THE

# GROWTH OF ENGLISH LAW.

BEING

## STUDIES IN THE EVOLUTION

OF

# LAW AND PROCEDURE

IN ENGLAND.

 $\mathbf{BY}$ 

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#### LONDON:

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1911.

## PREFACE.

THE object of the following pages is to describe some phases in the growth of English law and procedure, and to indicate influences which have affected their development. The field is so immense that if one reviews particular epochs and events in connection with this subject in anything like detail a book may appear inconsecutive, because it is impossible to present a complete narrative in a reasonable space. On the other hand, in order to appreciate any important phase of legal history it must be considered at some length, and especially in relation to contemporaneous political and social It is from this latter point of view movements. more particularly that the several subjects discussed in this book are regarded. There is yet another thing to be said, however regrettable, it is natural that those whose interest in law is professional should give but little attention to the manner in which jurisprudence and procedure have in the past changed and grown, or to the personal influence of jurists and judges, for they are fully occupied with its daily action. again who are engrossed either in the study of

political events, or are partakers in them, are apt to forget how intimately the growth of municipal law is connected with the progress of the nation, and that the Common Law of England is also the basis of the jurisprudence of the United States, and of many of the Dominions of the Crown beyond the Seas. It is therefore one of my objects in the following chapters to endeavour to stimulate greater interest in the history of English Law, and with this view to place before those who are anxious to know more of some phases of it in the past, information which I have from time to time collected from various sources and authorities, and systematized in a convenient form.

I must take this opportunity of expressing my thanks to Messrs. Longmans & Co. for their courtesy in allowing me to make use of material which has been published in the Edinburgh Review, and to the proprietor of the Law Magazine for the same permission. I am likewise indebted to Miss Helen Clergue for perusing the material of this book before going to press, and to Mr. H. M. Robertson for reading the proofs.

E. S. R.

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## THE GROWTH OF ENGLISH LAW.

#### CHAPTER I.

THE BEGINNINGS OF ENGLISH LAW, 1000-1272.

Before the time of Edward I. English law did not exist: Anglo-Saxon, Danish, Norman, and Roman law then partially prevailed, and Norman, ecclesiastical, and Roman influences were each at work. By the year 1272, however, English law, as we now understand it, had attained a definite shape, numerous changes, as well in its substance as its form, thereafter occurred from century to century, and from this date we witness not so much the gradual creation of a national law and judiciary, which is the characteristic feature of the previous period, as variations, co-extensive with the growth of England, of a national jurisprudence. Metaphorically speaking, from this time the various streams from different sources are united into one, which, widening, varying in aspect, broken in one place and diverted in another, has yet one unmistakeable and complete individuality. The metaphor, it is true, must not be pressed too far; it must not be supposed that English law from the time of Edward I. contained streams themselves clearly defined at that date, for it is a mixture of several systems, each being gradually modified during the course of time. "The picture of two streams

of law meeting to form one river would deceive us, even could we measure the volume and analyse the waters of each of these fancied streams. The law which prevails in the England of the twelfth century—this one thing we may say with some certainty—cannot be called a mixture of the law which prevailed in England on the day when the Confessor was alive and dead, with the law which prevailed in Normandy on the day when William set sail from Saint Valery. Nor can we liken it to a chemical compound which is the result of a combination of these two elements. Other elements which are not racial have gone to its making. Hardly have Normans and Englishmen been brought into contact, before Norman barons rebel against their Norman lord, and the divergence between the interests of the king and the interests of the great feudatories becomes as potent a cause of legal phenomena as any old English or old Frankish traditions can be. Nor, to take but one other example, dare we neglect, if we are to be true to our facts, the personal characters of the great men who accomplished the subjection of England, the characters of William and Lanfranc. The effects, even the legal effects, of a Norman conquest of England would assuredly have been very different from what they were, had the invading host been led by a Robert Curthose. And in order to notice just one more of the hundred forces which play upon our legal history, we have but to suppose that the Conqueror instead of leaving three sons had left one only, and to ask whether in that case a charter of liberties would ever have been granted in England. We have not to speak here of all these causes; they do not come within the history of law; only we must protest against the too

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common assumption, that the English law of later times must in some sort be just a mixture, or a compound, of two old national laws" (a).

This protest is necessary against a too stringent application of the metaphor, but with the qualification to be found in the passage which we have quoted it makes the character of the early growth of our law more comprehensible.

But in a brief review of the growth of English law during the first three centuries after the Conquest, one cardinal point needs at the outset to be emphasised, and that is the connexion of the law with the political and social state of the country. Nothing has tended more to divert men from a study of English law than the regarding it as a separate science; for it can never be properly studied unless it is considered in its relations to the nation generally and to national life. Law in some way is constantly affecting the daily affairs of each member of the community, and yet there is no subject which has been considered in a more detached manner and with less reference to its social or political effects.

The means of obtaining justice are of the first importance in every community, and we may therefore at once direct our attention to the subject of judicial institutions. Of Anglo-Saxon law the evidence is necessarily

<sup>. (</sup>a) The History of English Law before the Time of Edward I. By Sir Frederick Pollock, Bart., M.A., LL.D., Corpus Professor of Jurisprudence in the University of Oxford, of Lincoln's Inn, Barrister-at-Law, and Frederic William Maitland, LL.D., Downing Professor of the Laws of England in the University of Cambridge, of Lincoln's Inn, Barrister-at-Law. In 2 vols. Cambridge, 1895. Vol. I. p. 58.

obscure, and in such a state of society as existed in England prior to the Norman Conquest elaborate institutions of any kind are not to be expected. But, on the other hand, there may exist in rude communities a simplicity which may well be the envy of more advanced societies. And this was the case in the England of the Anglo-Saxons. The ordinary courts of public justice "were the county court and the hundred court, of which the county court was appointed to be held twice a year, the hundred every four weeks. Poor and rich men alike were entitled to have right done to them, though the need of emphasising this elementary point of law in the third quarter of the tenth century suggests that the fact was often otherwise" (b).

We should be wrong, however, if we allowed our ideas of courts of law in modern times to govern our minds in regard to those of such a primitive age as the tenth cen-The courts were then held in the open air. their procedure we know nothing; indeed, procedure scarcely existed. The judges were, of course, the leading men of the county and the hundred respectively: there was the ealdorman; the bishop too sat in the county court, since the Church claimed for him a large share in the direction of even secular justice. Probably the bishop was often the only member of the court who possessed any learning or any systematic training in public affairs, The means of enforcing judgements were rude; the subjects of these judgements were offences and wrongs common in every simple state of society-homicide, theft, more especially cattle-stealing. "The law of contract is

<sup>(</sup>b) History of English Law before the Time of Edw. I., Vol. I. p. 18.

so rudimentary as barely to be distinguishable from the law of property." In later years above and below the local courts are the king's courts and the private courts of lords, spiritual and temporal, of various degree. Of the latter next to nothing is to be seen in Anglo-Saxon times. That there were rights of private jurisdiction is a matter of surmise rather than of proof. It is possible, it may even be probable, that to a limited extent they existed before the Conquest. It is sufficient, however, to assume such a possibility from subsequent facts without direct evidence at an earlier date.

Of the preservation of the peace, and of the punishment of offences by the king, there is as little evidence as of private jurisdictions; but that it existed is nevertheless not a matter of doubt, though the extent of it is unknown. But what we have to bear in mind is that in these early times "the king's peace" does not represent a general royal jurisdiction. The phrase comes from a time "when the king's protection was not universal but particular, when the king's peace was not for all men or all places. Breach of the king's peace was an act of personal disobedience, and a much graver matter than an ordinary breach of public order: it made the wrongdoer the king's enemy." In fact a sanctity attached to the king's house, arising from the respect which belonged to him individually. His attendants and those over whom he threw his protection were entitled to be kept from hurt by means of his authority. Thus the particular protection of the early king grew into the general jurisdiction of later monarchs.

When we reach the times of the Norman and the

Angevin kings we are on both firmer and more interesting ground. The jurisdiction of the king, however, to which we have just referred, was long in forming itself into what we call courts of law under the Norman kings. "The king's justice was still extraordinary; the local courts were those to which men went; the king's court was not in permanent session." "Under the two Williams the name curia Regis seems to be borne only by those great assemblages that collect round the king thrice a year when he wears his crown, on the great festivals of the Church. It was in such assemblages that the king's justice was done under his own eye, and no doubt he got his way; still it was not for him to make the judgements of his court. Under Henry I. something that is more like a permanent tribunal, a group of justiciars presided over by a chief justiciar, becomes apparent. Twice a year this group, taking the name of 'the exchequer,' sat round the chequered table, received the royal revenue, audited the sheriffs' accounts, and did incidental justice. From time to time some of its members would be sent through the counties to hear the pleas of the crown, and litigants who were great men began to find it worth their while to bring their cases before this powerful tribunal. We cannot say that these justiciars were professionally learned in English law: but the king chose for the work trusty barons and able clerks, and some of these clerks, besides having long experience as financiers and administrators, must have known at least a little of the new canonical jurisprudence. But for all this when Henry died little had yet been done towards centralising in one small body of learned men the whole work of justice "(c).

<sup>(</sup>c) History of English Law, Vol. I. p. 86.

We have to go forward for more than half a century before we can really find national and recognised courts of justice; for it is in what is sometimes termed, perhaps a little fancifully, the age of Glanville—in other words, in the reign of Henry II.—that the system of English justice becomes visible in distinct and clearly defined forms.

Glanville was, indeed, a conspicuous figure in the reign of Henry II., but it is doubtful if he wrote the book—"A Treatise on the Laws and Customs of England, composed in the time of Henry the Second, while the Honourable Ranulph Glanvill held the Helm of Justice "-which is associated with his name. Indeed, the probabilities are in favour of the work being that of some clerk who had followed Glanville's decisions, rather than of a man who was a statesman and a soldier, as well as a lawyer-if lawyer even a chief justice may be called in the twelfth century. Glanville came of an old Suffolk family. 1163 he was made sheriff of Yorkshire; eleven years later, being then sheriff of Lancashire, he defeated the Scots near Alnwick, capturing their king. "From that time forward he was a prominent man, high in the King's favour, a man to be employed as general, ambassador, judge, and sheriff. In 1180 he became chief justiciar of England—prime minister, we may say, and viceroy." He went with Richard to the crusades, and died at Acre in 1190. The book which has been called after him seems to have been composed before the death of Henry II. in 1189. It is highly improbable that a man with the important duties which were cast on Glanville would have the time, even if he had the inclination, to carry out a task more fitted for the scholar and the clerk than the man of action and the judge. On the other hand, nothing is more likely than that some competent secretary or clerk should associate such a book with the name of his master—"cujus sapientia conditæ sunt leges subscriptæ," says Hoveden. That legal wisdom it would be the natural desire of an industrious subordinate to perpetuate. And some one has done so, leaving us a notable landmark in the history of English law—a book in which we see procedure and substantive law gradually emerging out of an early legal obscurity. The elementary divisions of what we now term civil and criminal law also become apparent. It is a book, however, which helps us to realise the importance of the reign of Henry II. in the history of our law, rather than one which perpetuates the fame of a jurist.

We must resume, however, our review of the legal history of the time, and we may say shortly that at the end of the above reign we find-still somewhat uncertain in its character, but yet clearly established—a central and permanent court, wherein the king dispensed justice through the agency of skilled men, and also a system of courts held by itinerant justices who were acting for the king. The number and personnel of these justices was uncertain, the procedure of the courts was not established, but yet "we may say that before the end of the reign there is a permanent central tribunal of persons expert in the administration of justice—of sworn judges. It can be distinguished from the courts held by the itinerant justices, for though every such court is curia Regis, this is capitalis curia Regis. It can be distinguished from the exchequer, for though it often sits at the exchequer, and though its principal justices will be also the principal

barons of the exchequer, it has a seal of its own and may well sit away from Westminster, while the fiscal business of the exchequer could hardly be transacted elsewhere. It can be distinguished from those great councils of prelates and nobles that the king holds from time to time; questions too great for it are to be reserved for such councils. Probably it is already getting the name of 'the bench,' and its justices are justices residing at the bench. Though it is curia Regis and capitalis curia Regis, it is not necessarily held coram ipso Rege. Apparently the writs that summon litigants before it bid them appear 'before the king or before his justices,' that is to say, before the king if he happens to be in England and doing justice, and if not, then before his justices. No doubt when the king is in this country he will sometimes preside in court, but whether the justices will then follow the king in his progresses we cannot say for certain; as a matter of fact during the last eight years of his reign the king's visits to England were neither very frequent nor very long. On the whole Westminster seems to be becoming the fixed home of this tribunal; but as yet all its arrangements are very easily altered "(d).

When we arrive at another period—"the age of Bracton," which coincides with the beginning of the reign of Edward I.—we have reached a time when the courts of law had taken that final form which they were to retain for six centuries, until by modern lawyers they were thrown back into that cumbrous whole from which by the necessities of advancing civilisation they had gradually evolved themselves. The

<sup>(</sup>d) History of English Law, Vol. I. p. 133.

reforms of 1873 were carried out with perhaps too little regard to the course of history and the modern tendency to specialisation, and in the present Supreme Court of Judicature we see the form of the ruder age of the twelfth century.

If we look at what were formerly called the courts of common law, we note at this time three distinct tribunals. The Exchequer was in a less defined state as a legal tribunal than the other courts to which we shall presently It was "in part a judicial tribunal, in part a financial bureau." Its duty as a government department, if we may use a modern phrase, was the real reason for its action as a court of law, though it is a curious fact that the dual character which the Court of Exchequer afterwards came to possess as the forum in which disputes about the revenue were settled and as an ordinary court of law was already becoming apparent. Its duty was primarily to find what was due to the king, and to compel the payment of it. It was natural that from this rather limited jurisdiction should grow a correlative onenamely, of adjudicating on claims against the king. Thus, when a man "thinks that he has a claim against the king, either in respect of some debt that the king owes him or in respect of some land that the king has seized, he will (this is the common practice of Edward I.'s day) present a petition to the king and council, and a favourable response to this petition will generally delegate the matter to the treasurer and barons, and bid them do what is right" (e).

<sup>(</sup>e) History of English Law, Vol. I. p. 171.

Under such circumstances the barons of the Exchequer were requested to obtain legal assistance from the judges of the other courts. This tribunal was resorted to by ordinary suitors for obvious reasons. It was doubtless regarded as a kind of tribunal of arbitration: it was trusted in its special disputes; it was without the drawbacks of the local courts, and those who composed it were quite willing to enlarge their special jurisdiction. spite of the fact that attempts were carefully made to prevent this trenching on the province of the other tribunals, the general jurisdiction of the Court of Exchequer by means of some legal fictions became an accomplished fact. In the age of Bracton this Court existed, but under difficulties, though it had reached a definite form as a special and a general tribunal. But the Exchequer was not in theory the king's court; it was not the court in which justice was dispensed by the sovereign, or, in his absence, by his own selected judges. That court had by the time of Edward I. grown into two distinct tribunals, with two distinct court rolls—the Common Bench, "the appropriate tribunal for ordinary civil suits between subject and subject," and the King's Bench, which was, strictly speaking, "the court of our lord the king held before the king himself."

There is always a danger in formulating very definite descriptions of institutions which have a gradual growth, and in some respects it would be misleading to speak of the King's Bench at the end of the thirteenth century as if it were a simple municipal tribunal for the decision of ordinary disputes, for at any moment the king might be present, and its resemblance to a modern law court would

then be lost in the return of the archaic and picturesque personal jurisdiction of the sovereign. This royal presence was, however, fast disappearing: it had appeared in a fluctuating manner for years, so that at times the Bench had been non-existent; while the Common Bench, as during the minority of Henry III., had been the king's court. Nor has the distinction between the king's court as we understand it and the king sitting with his council become altogether clear. "There remain in suspense many questions as to the composition and jurisdiction of this the highest of all tribunals. . . . The fourteenth century has to answer these questions; the thirteenth leaves them open." It is enough, however, that at this particular period we are able to see in defined form the courts of law which for several centuries were to exist in the same shape and to exercise the same powers. Again, we are able to see with reasonable distinctness the despatch of justice in the king's name in the country districts. But though the itinerant judges, whether for the purpose of the trial of criminals or for the decision of civil disputes, were partly justices from the king's court, the exclusive duty had by no means yet devolved on them. Early in Henry III.'s reign "this work was often entrusted to four knights of the shire; at a later time one of the permanent justices would usually be named, and allowed to associate some knights with himself." In nothing is the ubiquity of the law more noticeable than in these species of jurisdiction. In the second year of Edward I.'s reign "two thousand commissions of assize were issued"; in other words, the king's courts had jurisdiction in the remotest corner of the realm. But, again, we must not carry into our survey of this mediæval jurisdiction our

ideas of the assize of the twentieth century. The eyre, or iter, was much more than what we should now term a court of assize. Let us give the picture as it is presented to us in the History of English Law:

"If we suppose an eyre in Cambridgeshire announced, this has the effect of stopping all Cambridgeshire business in the bench. Litigants who have been told to appear before the justices at Westminster appear before the justices in now have at Cambridge. There is no business before bench at Westminster if an eyre has been proclaimed in all the counties. Then, again, the justices are provided with a long list of interrogatories (capitula itineris) which they are to address to local juries. Every hundred, every vill in the county must be represented These interrogatories—their number inbefore them. creases as time goes on-ransack the memories of the jurors and the local records for all that has happened in the shire since the last eyre took place some seven years ago; every crime, every invasion of royal rights, every neglect of police duties must be presented. The justices must sit in the county town from week to week and even from month to month before they will have got through the tedious task and inflicted the due tale of fines and Three or four of the permanent judges amercements. will be placed in the commission; with them will be associated some of the magnates of the district; bishops and even abbots, to the scandal of strict Churchmen, have to serve as justices in eyre. Probably it was thought expedient that some of the great freeholders of the county should be commissioned, in order that no man might say

that his judges were not his peers. An eyre was a sore burden; the men of Cornwall fled before the face of the justices; we hear assertions of a binding custom that an eyre shall not take place more than once in seven years" (f).

The view which we thus obtain is one of a widespreading justice, of courts of law as yet unfettered by technical rules. For what in more recent times has been known as "equity" as distinguished from "law"-in other words, a justice more rational because less technical -had not yet come into being, for the very simple reason that it was not yet required. The Chancery was, therefore, not a judicial tribunal at all. "The need of a separate court of equity is not yet felt, for the King's Court, which is not yet hampered by many statutes or by accurately formulated case law, can do equity." The non-existence of this "equitable" jurisdiction indicates not only the absence of complex disputes for decision and of harassing legal technicalities, but also shows us that the functions of judges were more in the nature of those now exercised by men whom we should term arbitrators. We have reached, in fact, a period of some definiteness of jurisdictions combined with much indefiniteness of technical law and procedure. A greater complexity of civilisation was followed by a remarkable increase in the technicality of English law, and the age of Bracton was in some respects an Arcadian period, when a universal justice was dispensed without costs and without the encumbrance of legal formalities.

<sup>(</sup>f) History of English Law, Vol. I. p. 180.

Equally noticeable and important is the change which has now become apparent in the character of the judges of the king's courts: ecclesiastics are giving place to laymen, and among laymen a body of professional lawyers is becoming evident who are either advisers of or advocates for suitors. The change was gradual; the king's judges were not drawn exclusively from the laity for many years, and of Edward I.'s judges not a few were clerks. But even before the end of Henry III.'s reign "the lay element is beginning to outweigh the ecclesiastical," and we have, therefore, passed out of that archaic period of society in which the priest is the judge. This is, of course, a social phenomenon of considerable importance; it marks a distinct epoch, for the more elementary a society the stronger is the religious influence in the sphere of law. The causes of this are diverse; with them, however, we are not concerned here. What has to be noted is the appearance of professional judges and of a professional class of lawyers, of precedents which begin to be of validity, of technical forms having later a frequently unreasonable importance, and of judicial decisions based on a general body of recognised and substantive law rather than on an uncertain mixture of moral and religious rules, customs, and common sense. Of these three features the work of Bracton, which has been well described in a single phrase as being "Romanesque in form, English in substance," is illustrative. The influence of the canon law and of Roman law is obvious not only in its breadth of view, but in some classical pedantries, occasionally also in some actual rules which supply the absence of authority arising either from English dicta, practice, or custom. But "the main matter of his treatise is genuine English law, laboriously collected out of the plea rolls of the King's Court." Some of these decisions may have been grounded in the first instance on principles of the Roman law, but as they existed when Bracton took them in hand they were the gradual results of the judicial enunciations of the King's Court during the preceding periods. We must be careful, however, to guard ourselves against supposing that the modern system prevailed by which certain cases formed precedents which are binding authorities on the Court. Decisions in this mediæval age were illustrations of the custom of the King's Court, which "is the custom of England and becomes the common law." They constitute a body of recognised law, but they do not individually govern and conclude judges in regard to certain states of facts, nor were they known to all the judges or to all their clerks. They formulate the opinions of those who had had to administer the law upon all manner of subjects; these had been regarded from an essentially English point of view (q). So far as Bracton was concerned, he only used his intimacy with canon and Roman law to enunciate opinions, gathered with exceptional industry from these decisions, in an orderly and ample form and with keen point. He produced a treatise, and not a mere collection of notes and cases. His work focussed with amplitude and clearness the national law which had been growing up since the Conquest, and it enables us to realise with some distinctness the real beginnings of the English common law, and to define it in this particular age. The

<sup>(</sup>g) In the exceedingly important case raising the question whether a palatinate can be partitioned, the magnates reject foreign precedents, "nec voluerunt judicare per exempla usitata in partibus transmarinis." (History of English Law, Vol. I. p. 162, note 3.)

term "common law" is a vague one: it has, even in the minds of lawyers, a considerable indefiniteness, it is regarded as something opposed both to statute and to case law, whereas this work of Bracton shows us that its elements are largely composed of judicial decisions. The book was a basis also for the works of future writers and for many judicial decisions in later years, as the subjectmatter of English law expanded with the advance of population and civilisation. It is, in fact, a kind of legal vantage-ground, dividing two periods, from which we can look into the past and the future.

Bracton's career is illustrative of that characteristically hybrid personality of the time, the ecclesiastic who is half a lawyer, and who is the product of the combination of two ages. He can be described in a few words. His name was Henry of Bratton; he was a Devonshire man, and probably began his career as clerk to William Raleigh, a justice of the Common Bench and later Bishop of Norwich. From a justice in eyre he became a justice of the King's Court, from which position he appears to have retired about the year 1257, though to the day of his death, in 1267, he continued to act as justice of assize in the West. If this were all that could be said of him, he would be regarded simply and solely as a lawyer; but soon after he ceased to be judge of the central court he became rector of Combe, near Teignhead, and subsequently rector of Bideford, archdeacon of Barnstaple, and chancellor of Exeter Cathedral. Thus he was both a lawyer and an ecclesiastic. He reached a judicial position, after the manner of the French judges of to-day, by subordinate official The best portion of his life he seems to have work.

passed as a purely legal judge, and he ended it while acting as a judge of assize and as a Church dignitary of some importance. He is typical of an age of transition, in which, though nominally an ecclesiastic, he was, while performing legal duties, practically wholly a lawyer. He took up clerical functions as the easy occupation of the later days of life, not as the work of his youth and prime. Both Bracton and his predecessor Glanville are remarkable figures in the history of English law, and while the works associated with their names enable us to understand the state of English law at the time when they were composed they cannot be regarded as books which influenced it in substance or in form, and they are indicative rather than formative.

In reviewing the growth of the legal tribunals we are almost insensibly led to a consideration not only of the forms by which their assistance was obtained and of the means by which their judgements were enforced, but of the substantive law which formed the subject-matter of their decisions. Such a study of details would, however, plunge the reader into too large a mass of legal technicalities; but one feature in relation to this growth is obvious above all technicalities—that is, the native character of both English law and procedure. No doubt here and there Continental influences may be traceable, due to the learning of some ecclesiastics; but such features are isolated, and the progress of both law and procedure is marked by an individuality which has made the English common law a system of its own, not adopted from the codes or decisions of the Continent, but bearing on every part of it the impress of the national movements among which it arose and of the ruling men among whom it had its growth. Of this native character there is to be found a noticeable instance in the forms of actions—that is to say, that the nature of the relief to be given to a person who was aggrieved was shown by the writ which he obtained from the royal Chancery. This was essentially a practical proceeding; the writ was issued not in consequence of any juristic theory, but to meet an everyday want: it was the act of the sovereign, essentially the fountain of justice, standing above all his nobles and willing a right to his subjects. The system was one characteristic of a period of legal growth, during which time the writs must have embraced most of the ordinary causes of action and would thus tend to become fossilised.

"The age of rapid growth is that which lies between 1154 and 1272. During that age the Chancery was doling out actions one by one. There is no solemn actionem dabo proclaimed to the world, but it becomes understood that a new writ is to be had, or that an old writ which hitherto might be had as a favour is now a writ of course. It was an empirical process, for the supply came in response to a demand: it was not dictated by an abstract jurisprudence; it was conditioned and perturbed by fiscal and political motives; it advanced along the old Roman road which leads from experiment to experiment" (h).

It took nothing essential from the highly organised legal procedure of Rome; it went on its own way, administering to the needs of the people as they arose. "Tot erunt formulæ brevium quot sunt genera actionum,"

<sup>(</sup>h) History of English Law, Vol. II. p. 557.

writes Bracton—that is to say, in other words, there was a distinct remedy, clear in its form, for every wrong. The modern lawyer is familiar with some writs, but the comprehensive character of this formulary system is scarcely to be appreciated without a reference to the table of writs printed in Pollock and Maitland's "History of English Law." It shows the forms of actions brought before the justices who in the years 1256, 1269, and 1279 made an evre in Northumberland, and also the actions on the roll of the Common Bench for Easter Term in 1271. They number sixty-one different forms in all and comprehend a list of remedies for the ordinary wrongs of everyday life. They include such writs as those of De Nativo habendo and De Libertate probanda—that is, writs for affirming villenage and negatory of it. in the so-called age of Bracton there existed a legal system very special in its character, but conducive to the wellfare of the people, since it gave them a recognised series of remedies which no kind of judicial discretion could alter. It was a system, however, which, beneficial during its growth and early period of maturity, was certain to degenerate into one of undue technicality when society became more complex. In later ages it conduced sometimes to a denial of justice and required adaptation to the needs of modern times by the administration of what is termed equity. But the same power which in the twelfth and thirteenth centuries sent forth writs in various forms was that which later was to soften the rigour of the common law by a species of judicial discretion and common sense.

A class of professional lawyers is now also becoming

pretty clearly defined. Such a growth is in some respects a subject rather for the student of sociology than of legal history; but it is so connected with the latter that it cannot be passed over in any view we take of English law at the end of the thirteenth century. Before the end of it "there already exists a legal profession, a class of men who make money by representing litigants before the courts and by giving legal advice. The evolution of this class has been slow, for it has been withstood by certain ancient principles. The old procedure required of a litigant that he should appear before the court in his own person and conduct his own cause in his own words. one thing, the notion of agency, the notion that the words or acts of Roger may be attributed to Ralph because Ralph has been pleased to declare that this shall be so, is not of any great antiquity. In the second place so long as procedure is very formal, so long as the whole fate of a law-suit depends upon the exact words that the parties utter when they are before the tribunal, it is hardly fair that one of them should be represented by an expert who has studied the art of pleading: - John may fairly object that he has been summoned to answer not the circumspect Roger, but the blundering Ralph; if Ralph cannot state his own case in due form of law, he is not entitled to an answer. Still in yet ancient days a litigant is allowed to bring into court with him a party of friends and to take 'counsel' with them before he pleads. In the Leges Henrici it is already the peculiar mark of an accusation of felony that the accused is allowed no counsel, but must answer at once; in all other cases a man may have counsel. What is more, it is by this time permitted that one of those who 'are of counsel with him' should speak for him.

The extreme captiousness of the old procedure is defeating its own end, and so a man is allowed to put forward some one else to speak for him, not in order that he may be bound by that other person's words, but in order that he may have a chance of correcting formal blunders and supplying omissions. What the litigant himself has said in court, he has said once and for all, and he is bound by it; but what a friend has said in his favour he may disavow. The professional pleader makes his way into the courts, not as one who will represent a litigant, but as one who will stand by the litigant's side and speak in his favour, subject, however, to correction, for his words will not bind his client until that client has expressly or tacitly adopted them. Perhaps the main object of having a pleader is that one may have two chances of pleading Even in the thirteenth century one may see correctly. the pleader disavowed. One John de Planez in his pleading for William of Cookham called Henry II. the grandfather instead of the father of King John; William disavowed the plea and the advocate was amerced for his blunder. And so before any one is taken at his pleader's words it is usual for the court to ask him whether he will abide by those words. Just because the pleader makes his appearance in this informal fashion, as a mere friend who stands by the litigant's side and provisionally speaks on his behalf, it is difficult for us to discover whether pleaders are commonly employed and whether they are already members of a professional class. The formal records of litigation take no notice of them unless they are disavowed" (i).

We have here a clear and graphic description of the position of the advocate: he is just ceasing to be, to use a legal phrase, "the next friend" of the litigant or the prisoner, and is becoming a professional and paid agent, skilled in one particular kind of work and retained for a particular purpose—namely, of acting as counsel in court. As the right of obtaining the assistance of a representative before the judges became recognised and common, the growth of a class of men to act as advocates is part of the ordinary and natural evolution of particular classes, of an advance into a more artificial state of society. As soon as we find, as is the case in the reign of Edward I., that the king has a number of pleaders who are known as his servants or "serjeants" at law, we may at once accept the fact as evidence of the existence of this particular class and of the completion of the period of growth.

A curious and interesting point in regard to this subject is the fact that, even at this early period in the history of English law, the class of attorneys was not the same as the class of advocates. The attorney was at first merely an agent ad hoc; he was not a man of one profession; he was placed by the litigant as his "agent" to gain or lose in some particular plea; the abbot appointed a monk and the baron his steward. If a more extensive agency was required, a man had to obtain the power of delegation by means of a royal writ, and he had to show some reason for his demand; the grantee of the writ must be going abroad on the king's business or be incapacitated by age or sickness. In time the same names begin to appear; it is easy indeed to understand how, in a particular locality, two or three persons should get into

the habit of acting as attorneys when the justices in eyre came round, and how in time there should thus be found a number of persons familiar with the increasing formalities of the law, and willing, for a recompense, to save a litigant the trouble of attending to legal matters. But the reason for the growth of two separate classes of lawyers is not visible. In 1280 the corporation of London directed as to the civic courts that "no countor was to be an attorney." Of the cause of this direction we are ignorant, nor does the History of English Law give us any help. group of counsel, of serjeants and apprentices on the one hand, and a group of professional attorneys on the other, and both of them derive their right to practise from the king, either mediately or immediately." Such was the state of things at the end of the thirteenth century, and if we were to hazard a suggestion as to this remarkable and longcontinued division of the legal class in England it would be that it sprang from the same spirit of exclusive trading which produced the various gilds for commercial purposes, and from the same spirit of exclusiveness, of which selfinterest was at the bottom, which gave in the mediæval times various rights to certain classes of the community, which, while they benefited those who possessed them, were a corresponding detriment to those who were without them.

Whilst justice was found throughout the country there were here and there some exceptions to its equal incidence. One instance is to be found in regard to serfdom. This subject belongs in some respects to the social as much as the legal history of our country, but in some respects also it has an important bearing on the state of English law in

the Middle Ages. In legal phraseology all men were either freemen or slaves; the latter were called *servi*, *villani*, or *nativi*—the three terms representing one and the same idea. But this serfdom was not absolute, it was relative, and in fact may well be called prædial:—

"In the first place, it rarely, if ever, happens that the serfs are employed in other work than agriculture and its attendant processes; their function is to cultivate their lord's demesne. In the second place, the serf usually holds more or less land, at least a cottage, or else is the member of a household whose head holds land, and the services that he does to his lord are constantly regarded in practice as the return which is due from him in respect of his tenement. . . . In the third place, his lord does not feed or clothe him; he makes his own living by cultivating his villein tenement, or, in case he is but a cottager, by earning wages at the hands of his wealthier neighbours. In the fourth place, he is seldom severed from his tenement, he is seldom sold as a chattel, though this happens now and again: he passes from feoffor to feoffee, from ancestor to heir, as annexed to the soil "(k).

The villein was thus in relation to his lord a slave, he had no proprietary right as against him, he was in theory as much his chattel as the goods in his castle; but the serfdom was a link between two persons: it was essentially relative, for as regards persons other than his lord, the serf had nearly all the rights of a freeman. When the lord was not concerned, the criminal law made no difference between bond and free. "A blow given to the

<sup>(</sup>k) History of English Law, Vol. I. p. 397.

serf is a wrong to the serf." The serf might, as regards men in general, "have lands and goods, property and possession, and all appropriate remedies." But the position was essentially anomalous, for the serf could enforce an agreement made with a person other than his lord; yet if this person endeavoured to enforce a contract against the serf it was a good plea that he was the villein of X, when the agreement was made, and all that he had belonged to him. By degrees this plea seems to have become limited in its force, and while constantly urged in actions for land was not set up in purely 'personal' actions. The result of this singular position of the villein was, as is obvious, actually to place him in a better position than a freeman, for even when the villein could be sued, as in regard to chattels, yet, as the latter just as much as the serf belonged to the lord, it was hardly possible "to prevent collusion between villeins and friendly lords." His state of villeinage gave the serf what must also be regarded as other privileges, for he was exempt from onerous and unpleasant duties. could not sit as a judge in the communal courts, though he often had to go to them in the humbler capacity of a 'presenter.' So too he could not be a juror in civil causes: this he probably regarded as a blessed exemption from a duty which fell heavily on freemen." On the other hand in the manorial courts full duties fell on the serf, he could be a presenter, a juror, an affeerer of amercements, and he was commonly the reeve of the township. To discuss here how a man became a serf, and how he could be emancipated, would carry us beyond our present subject; what we must bear in mind is the relativity of serfage in England in the age of Bracton. It is a juristic curiosity,

produced possibly by the desire of lawyers to simplify the state of the law, possibly by other motives which are mere matter of conjecture. The lawyers recked "little of the interests of any classes, high or low; but the interests of the State, of peace and order and royal justice, are ever before them." In the transformation of a more rigorous system of slavery into the relative serfdom of the Middle Ages it is probable that motives of statesmanship had some influence. The change, while producing a social benefit to the class of villeins, created a striking and peculiar feature of English law.

If we turn from the village to the town, from agriculture to commerce, we at once meet with the Jews, the bankers of the mediæval world. At the age of which we are now writing the Jew was a person of the first importance. Though he was in a position of relative servility to the king, that relation gave him, like the serf, some positive advantages. Everything that he acquires, says Bracton, is for the king, and for that very reason it was to the advantage of the sovereign to protect the Jew. Thus a department of the Exchequer was organised for the supervision of the business of loans, which was in the hands mainly of the Jews. It was "a financial bureau and a judicial tribunal." It "acted judicially not merely as between king and Jew, but also as between king and Gentile when, as very often happened, the king had for some cause or other 'seized into his hand' the debts due to one of his Jews by Christian debtors. Also it heard and determined all manner of disputes between Jew and Christian. Such disputes, it is true, generally related to loans of money, but the court seems to have aimed at and

acquired a competence, and an exclusive competence, in all causes, whether civil or criminal, in which a Jew was implicated, unless it was some merely civil cause between two Hebrews, which could be left to a purely Jewish tribunal "(l).

Thus we have here two notable exceptions to the ordinary incidence of the law, which, except in criminal cases, removed the Jew almost entirely from the jurisdiction of English law; though a slave to the king, he was free in relation to all other persons. When Hebrew went to law with Hebrew each appealed to his own tribunal, and when Hebrew and Christian could not agree the dispute was settled by a special tribunal, where the Jew was certain of a favourable audience. In the society of the thirteenth century, immediately before their expulsion from England, the Jews take a foremost place; they are necessary to the king, to the landowner, and to the merchant; they are helping, without the goodwill of the English people, in the development of the English nation, and, what is more to our immediate purpose, they are for the time being producing a marked effect on the course of English law by causing the establishment of special tribunals and the withdrawal of a large and important class of persons from the jurisdiction of the ordinary But whether these special tribunals affected the substance of our modern law is doubtful. Be that, however, as it may, no review of English law in the age of Bracton, as it has been termed, is complete which does not take some notice of the relation of the Jew to the laws of the age.

<sup>(1)</sup> History of English Law, Vol. I. p. 453.

If we turn from laymen to Churchmen we find in clerks and monks a third class of persons, to some extent not subject to the general law. The exception is the more remarkable because it was from among ecclesiastics that judges and attorneys in legal affairs were mostly drawn. A monk, though civilly dead, and unable to hold any property of his own, "was fully capable of acting as the agent of his 'sovereign,' and even in litigation he would often appear as the abbot's attorney." The great place which he held in worldly affairs in mediæval days is too well known to be here insisted on, but nevertheless in the eye of the law he bore the same relation to the abbot as the villein to his lord; he could neither sue nor be sued without his lord. He was, in fact, in relation to his superior in the same position as the villein to his lord. "Every monk was the absolute subject of some 'sovereign' -normally an abbot, but in some cases a prior or a bishop." The sovereign was an absolute monarch, and so long as he did not deprive his subjects of life or limb the temporal power in no way interfered with In criminal matters the position of the monk him. was anomalous. For small offences, transgressiones—or, in modern legal language, "misdemeanours"—he could be punished in the temporal courts. In respect of graver crimes he enjoyed that benefit of clergy which was also the privilege of the clerk. In theory it can scarcely be called a privilege, since under it a clerk could be indicted For the permission by the secular before two tribunals. power to the ecclesiastical power to try clerks who were accused of grave crimes in the ecclesiastical courts cannot be regarded as a relinquishment of the right of trial; it was merely the recognition of a co-ordinate and permitted

jurisdiction. For it has to be remembered that at the time of which we are now speaking a preliminary investigation into the alleged offence was held, and if the jurors found that the accused was guilty he was delivered to his bishop for trial in the episcopal court. It is said that the procedure in the bishop's court at the end of the thirteenth century was "little better than a farce." Thus the preliminary inquiry, though it may sometimes by the acquittal of a prisoner in the first instance have prevented unjust verdicts in the bishop's court arising out of personal motives, was much more a safeguard against the escape of ecclesiastical offenders who were really guilty of the crimes alleged against them. While in some respects it was an unrecognised protection of the monk and the clerk from episcopal or abbatical tyranny, it was more especially a check on the absolute immunity from punishment of those entitled to the protection of the Church, for the tendency of this privilege of the benefit of the clergy was to "breed crime and impede the course of reasonable and impartial justice." The temporal power, in fact, could and did declare that there was a primâ facie case against an accused clerk: it could not and did not cause him to be punished. It asserted its theoretical right over him as an ordinary citizen, but in most cases its action allowed him to escape altogether from punishment, or only to suffer from the mild judgement of an ecclesiastical court. At the same time the admitted right and · the practice of the temporal courts to punish forest offences and "transgressiones" committed by clerks or monks was a tacit surrender by the Church of the whole claim to the exclusion of monks and clerks from the jurisdiction of the sovereign. It put these men on the same

legal level in regard to the lighter offences of daily life as the common layman, and was a continual reminder that the clerical caste was within the limits of the municipal The permission of the privilege of the benefit of clergy in respect of graver crimes, even under the limitations already mentioned, was a concession to the Church of a substantial kind, and was also an admission for the time that the Church was too powerful for the withholding of all exceptional privileges from it. curious compromise, imperfect, no doubt, but tending to prevent friction between the Sovereign and ecclesiastical authorities, for we have only to recollect the quarrel between Henry II. and Becket to understand the practical gravity of such disputes. The position was illustrative of an essentially transitional period in the history of English law, which is to some extent also the conclusion of a conflict of many years between the king and the Church, from which neither the temporal nor ecclesiastical powers were able to obtain a decisive advantage.

## CHAPTER II.

THE FORESTAL LAWS AND FORESTS OF THE MIDDLE AGES.

In mediæval England the existence of definite tracts of land which were royal forests, and within which a particular body of law was enforced, vitally and daily affected the lives of large numbers of the people. With the forests came into being forest laws, which occupy a considerable place in the earlier annals of English law. They were special in their nature and limited geographically, and were, therefore, variable in their application. They were enforced by officers of the forest, and recognised by the King's Courts, though the main link between the minor courts of the forest with its laws and the king as the fountain of justice, were the justices in eyre.

These itinerant justices were appointed by the sovereign to hear and determine pleas of the forest, as other justices—in some instances the same men—were appointed every seven years to hear pleas of the Crown and common pleas. Of this elaborate system we are now able to take an accurate survey, for the publication in 1901 of a volume on "The Select Pleas of the Forest" (a) supplied the requisite material.

<sup>(</sup>a) The Select Pleas of the Forest. Edited for the Selden Society by G. J. Turner, M.A., Barrister-at-Law. London: Bernard Quaritch. 1901.

Before the publication of this book, the Treatise of Manwood, first published in 1598 and continued through various editions, was the authority to which it was always usual to refer for information on the forest laws. That work is an instance of the way in which a legal imagination can create legal fictions. Manwood constructed an ingenious but altogether fanciful and untrue theory of a contract between monarch and people. return for the continual care and labour which he gave to the preservation of the whole realm, the king was presented by his subjects with the prerogative of having places of recreation and pastime wherever he might desire, and so he could make a forest at his will and pleasure for the shelter of beasts of the chase. Bracton long before Manwood's time had evolved the theory that as no private person had a property in wild animals they must therefore be the property of the king. If one could imagine a royal right over, we need not say property in, a red deer or a wild boar, it was easy to construct a theoretical right in the sovereign to have places where certain animals might. be secure from the pursuit of any man except the sovereign and of one who was authorised to hunt by him. But Bracton also formulated the doctrine that occupancy was the basis of the right to property, and it was this doctrine which the Norman kings carried into practice. But something more than this was needed to justify many of their acts, for they were not careful at all times to respect private rights when afforesting land, often including towns and villages within a newly created forest with its indefinite metes and bounds. A specious theory, such as that of Manwood, was needed to give even a semblance of legal propriety to their conduct.

But the prerogative of the king to have and to enjoy royal forests rose, in fact, from simple causes, partly because he was the only distinct representative of the State, and partly from superior individual power. The property of the Saxon sovereign in wastes and forests, which appears to have taken the place of an equally vague communal right, indefinite enough in its extent as it must have been, passed to the Conqueror when he was crowned at Westminster. From his own strength, from the weakness of his subjects, and from the disturbance, resulting from the Conquest, of the old order both of property and of government, he had the opportunity of increasing the number of places within the forestal jurisdiction of the sovereign. The king could, in fact, assert an actual forestal right over any part of the country which was not clearly the undoubted property of one of his subjects, and even then some excuse might be made for its forfeiture to the Crown. As he moved about his kingdom, passing from castle to castle and from town to town, opportunities constantly arose for him to gratify his desire for the extension of his territorial influence and power, and his passion for the chase. Thus in an inquiry as to the right to the bailiwick of the forests of the counties of Leicester and Rutland, we meet with an instance of what appears to be purely arbitrary afforestation:-

"Upon a search among and an inspection of the rolls of the eyre of Geoffrey of Langley and his fellow-justices in eyre for pleas of the forest at Oakham in the thirty-third year of the lord king who now is, it is found that it was presented and proved before the same justices in their

eyre by twenty-four sworn knights and loval men of the county of Rutland that when King Henry I., the son of king William the Bastard, was on his way towards northern parts, he passed through a certain wood, which is called Riseborough, in the county of Leicester. And there he saw five hinds. And he forthwith ordered a certain servant of his by name Pichard, to tarry in those parts until his return from the parts aforesaid, and in the meantime to guard the said hinds for his use. But it happened that in that year the said king did not return there; and in it the said Pichard associated himself to a certain serieant of the same country who was called Hasculf of Allexton, whose house he frequented much. But when the year was passed, after the aforesaid king had returned from the northern parts, the said Pichard came to the king aforesaid, saying that he was unwilling to be custodian of the aforesaid bailiwick any longer. And on being then asked by the same king who would be a fit person to be custodian of the said bailiwick, he replied, the said Hasculf, who had lands near there, and was resident in the same bailiwick. And then the said king entrusted to the aforesaid Hasculf the custody of the said bailiwick, to wit, the forestry of the county of Leicester and also of Rutland; and he was custodian of it all his time, and he lived for a long time, that it is to say till the time of king Stephen, and was then killed in his own house by Bartholomew de Verdun. And after the death of this Hasculf, a certain Peter, his son, received the custody of the aforesaid bailiwick from king Henry, the grandfather of the lord king who now is" (b).

<sup>(</sup>b) Select Pleas of the Forest, p. 45.

How picturesque and suggestive is the glimpse which the old roll gives of the mediæval monarch journeying with knights and retainers through the strong growing woodlands of the midlands, the herd of shy deer suddenly perceived in some opening in the forest, and the quick inquiry as to who was the warden of the wood. was doubt and hesitation as to the ownership of the property, which was soon ended by the king giving to Pichard-probably a Frenchman-the bailiwick, and charging him, partly in jest and partly in earnest, to guard the five hinds till he again came south. A district could be afforested in a moment by the mere word of the monarch, while it took centuries to free it from the royal By a simple act indicative of his right to occupy it, the king could take possession of acres of unowned land; but whilst he took the land as the supreme head of his people, he forgot both their wants and their natural feelings. What the peasant or the villager resented was not so much the assertion of a royal title to the forest, the woods, and the waste, even the mere pleasure of the chase, as the fact that this assertion prevented the enjoyment by the people of property of which the king was no more than a trustee, but which he treated as the gift of heaven to an anointed and beneficent autocrat, not seldom exercising his prerogative so as to cast his dominion over cultivated land, hamlets, houses. and small towns which up to that time had been free from the restrictions of the forest laws.

In Norman England were great tracts of almost uninhabited country, and nothing, as the instance just presented shows, was easier than for the king, as the chief personage in the land, to assert his paramount right to these portions of his kingdom in the simple manner which the chronicle describes. It was a right which appealed to the natural instincts of a man who enjoyed the pleasures of the chase: and had also to consider the few but necessary demands of his exchequer. Far, however, from there being any kind of contract between governor and governed in regard to forests, the whole course of mediæval politics shows a steady endeavour by the sovereign often to enlarge and always to retain his forestal jurisdiction against the will of his subjects, and equally constant though fluctuating efforts on the part of the barons and of the people to lessen both the power of the Crown and the territorial extent of the royal forests. But though all classes were united in a common animosity to the forestal dominion of the king they had no common sympathies. A baron was as harsh a lord of the forest as a king; indeed, when, as in parks, the baron had his own miniature forest, the penalties against trespassers were more severe than in the king's forest. The aristocratic poacher who made deer traps in the bounds of his park as near to the royal forest as possible, sometimes so close that he was summoned before the justices for a nuisance, for an offence against the forest law, had no mercy for the peasant who, within the bounds of the park, killed one of the truant deer or cut a limb from an oak or an elm. Another point should be noted in this connexion. We must not regard the king in the assertion of his prerogative as an unreasonable tyrant; it is useless to apply theories suitable to highly-civilised communities in regard to the right to unoccupied land to a ruder age. There was no reason why the king, as representative of the nation, should not become the owner of waste land as much as a baron or a peasant; nor should it be forgotten that the payments received from the forest were not always employed by the sovereign for his mere personal pleasure. For as in the royal forests there were special courts and special laws side by side with the ordinary tribunals and jurisprudence which were applicable to the rest of England, so too the forests formed a special source of revenue having no relation to scutage and carucage and feudal dues, a revenue which could be collected by the king's officials without the consent of the national council.

This contest between Crown and people is observable from the moment of the Conqueror's death. William Rufus made the practice of the forest custom "burdensome to baron and villein alike," but in the very year of the accession of his successor Henry I., the latter secured a general ratification of his title. "I retain," he says in the Charter (c) of 1100, "by the common consent of my barons, my forests as my fathers had theirs." Henry I. was a mighty hunter, and he increased the royal forestal possessions so that Stephen was obliged to promise, by the Charter of 1136, to relinquish the land afforested by Henry. But the undertaking made to his people was not kept, and again, in 1184, we perceive in

<sup>(</sup>c) The Charter of the Forest of Canute was a forgery: this, though often surmised, seems now to be certain; see Liebermann, "Ueber Pseudo-Cnuts Constitutiones de Foresta." Halle, 1894. This writer ascribes this document to the year 1184, and as being the work of a layman. Dr. Stubbs and Dr. Freeman each doubted its authenticity, but many writers have accepted it with naïve simplicity.

the Assize of Woodstock of Henry II. an attempt by the barons to modify the severity of the forest laws, and to render them more definite. These struggles, indicative of the social importance of the forests and of the forest laws, were to a certain degree ended by the Charter of the Forest of 1217. But these continual edicts would have been constitutionally absurd if the king had a theoretical and prerogative right to make forests where he pleased, since he would have been endowed with an undisputed personal power which could be employed not only for the exaction of all sorts of fines and aids, but for the increase of the actual property of the sovereign.

In those troubled ages, and when might was largely right, it is easy to realise the continual extension of the forestal dominion of the king, a dominion which was primarily obnoxious to the barons, not from any love of the common people, but because it necessarily lessened their own power. To counteract this increasing dominion of the Crown was the motive which obtained from the infant Henry III. in 1217 the Charter of the Forest, a. necessary sequel, in the then existing polity and social condition of England, of the Great Charter. It marked the end of the unlicensed forestal power of the sovereign, it defined the extent of his dominion—it was a constitutional landmark, a document the vague limitations of which the sovereign was for a long time constantly trying to evade and the people to enforce. The king had often to confirm Magna Charta—"these repeated confirmations tell us how hard it is to bind the king by law. The pages of the chroniclers are full of complaints that the terms of the charter are not observed. . . . This theoretical

sanctity and this practical insecurity are shared with the great Charter of Liberties by the Charter of the Forest" (d).

The Charter of the Forest by its very terms reveals the evils under which the country had suffered in the two preceding reigns, and more especially under the rule of John. His despotism, his exactions, and his antagonism to his barons had made his power as chief lord of the forests a national curse, and so all the woods which had been made part of the royal forests either by Richard or by John were to be summarily disafforested: "Omnes autem bosci," runs the third section of the Charter, "qui fuerunt afforestati per regem Ricardum avunculum nostrum, vel per regem Johannem patrem nostrum usque ad primam coronationem nostram, statim deafforestentur, nisi fuerit dominicus boscus noster." This declaration was a recognition on the part of the young king's advisers-for the charter was issued with the seals of William Marshall. Earl of Pembroke, and of Gualo, the papal legate-of a multitude of illegalities in the stormy reign which was lately ended. Contrast it with the first section, and the difference between them is at once obvious. one case there is to be absolute relinquishment, in the other there is to be inspection, and, if need be, disafforestation, when woods have been taken to the damage of their owners; a direction which is suggestive rather of mistakes uncertain boundaries than of downright royal rapacity:-

"Imprimis omnes forestæ quas Henricus rex avus

<sup>(</sup>d) Maitland, Hist. of English Law, Vol. I. p. 158.

noster afforestavit, videantur per bonos et legales homines; et si boscum aliquem alium quam suum dominicum afforestaverit ad dampnum illius cujus boscus fuerit, deafforestentur. Et si boscum suum proprium afforestaverit, remaneat foresta, salua communa de herbagio et aliis in eadem foresta illis qui eam prius habere consueurunt."

That the king's forests, even those which may, by something like a misuse of language, be termed his property, should need delimitation is not remarkable when we bear in mind the actual nature of a mediæval royal forest. It was assumed to be a definite tract of land within which a particular body of law was enforced, a district including both woods and open country. Within this boundary private persons might have lands, though in them they could neither cut wood nor kill certain wild animals, yet, in many instances, both woodland and open land belonged to the king. It is difficult enough in times of advanced civilisation for men to know accurately the limits of landed property; to suppose that in the thirteenth century, in an often uncultivated, uninhabited, and roadless district, the bounds of the king's possessions could be definitely fixed, even though some metes and bounds were stated, is obviously absurd. This very uncertainty rendered the royal forests an easy source of revenue, sometimes by means of fines justly levied, more often than not by demands which were simply illegal exac-But, though vexatious imposts, these were not severe punishments; no feature, indeed, of the forest laws is more to be noted than the comparative mildness of the punishments. They were lenient for a very good reason:

fine a man to-day and he lived to be fined to-morrow; kill him, and in those days of sparsely inhabited counties a taxpayer had been destroyed. Thus the forest—although Manwood, as we have seen, had invented an agreeable theory of a social contract, pleasure given in return for work—was usually regarded by the mediæval monarch from the same point of view as that of a modern Chancellor of the Exchequer who looks upon this piece of property or that as a fruitful source of revenue.

But as the Charter of the Forest marks the conclusion of the period of unlicensed forestal dominion, so it commences the period of the inevitable decay of a system which was antagonistic to the beneficent growth of national civilisation.

The immediate effect of the charter was to cause great disturbance to forest administration, since in order to carry out its provisions perambulations of the bounds were necessary to ascertain with accuracy the forests which ought to remain under the dominion of the king.

The perambulations themselves and the awards, as they may be called, which were a consequence of them, as might be expected, in the case of districts the boundaries of which were so uncertain, were satisfactory neither to the people nor to the sovereign, and on February 11, 1225, the charter was again issued, "spontanea et bonâ voluntate nostrâ," but in return for this favour a grant of a fifteenth of all movables was obtained from the nobles. The moment, however, that Henry came of age he challenged some of the disafforestments made during his legal infancy, drawing no distinction between rich and poor,

layman and ecclesiastic, as when the Abbot of Abingdon was ordered to produce the charters of the king's predecessors under which he claimed liberties in the forest and the disafforested districts. Throughout Henry's reign and that of his son the same effort on the part of the sovereign to retain his forests under a cloak of legality continued, for the charter was constantly confirmed. But as such confirmation did not settle local disputes, or define boundaries, it did not prevent the king from asserting his existing rights sometimes by the silent but effective method of preventing or not directing perambulations and inquiries.

On the other hand the people had no scruple about making use of the same vagueness of bounds to diminish the property of the king. "In most forests," the reference is to the end of the reign of Edward I., "the jurors paid no attention to the boundaries made at the beginning of the reign of Henry III. They put out of the forest vast tracts of land which had been forest for a century and a half, alleging that they had been afforested by Henry II., or his sons Richard and John, and disregarding the distinction between districts which had been afforested for the first time, and those which had been reafforested as ancient forests by Henry II." conflict was inevitable, and that it should be conducted under the semblance of legality by each side was equally natural, but it could have only one result—the gradual diminution of the royal forests under the influence of an advancing civilisation. A system of forestal administration and law was altogether incompatible and impossible as agriculture and population increased.

That the English forests could by any possibility be generally used by the king for the purposes of sport, though in theory and practice they were his preserves, is obviously impossible when we bear in mind their number and size, though these two characteristics serve to emphasise their importance from a legal point of view. "King John, when in England, spent much of his time in visiting the forests of Sherwood, Rockingham, Essex, and Clarendon, and it was from these that Henry III. usually made presents of game to his friends." particular wastes and woodlands, however, were mere selections from the numerous royal forests. To state with any degree of accuracy either the extent or the number of the whole is as yet impossible, and will probably remain so. But "it is almost certain that none of the kings of England possessed any forests in the counties of Norfolk, Suffolk, and Kent . . . it may be considered as probable that there were either no forests in Cambridgeshire, Bedfordshire, and Hertfordshire, or forests of a small extent only"; while in Lancashire they were granted Edward I. to his brother, Edmund Crouchback, who was allowed to enforce the forest laws over the forests which it contained.

On the other hand, all Northamptonshire and all Rutland were a tract of forest, while "one vast forest stretched from Stafford to Worcester, and from the Wrekin to the Trent" (e), and certainly at the time of Domesday a densely wooded district—broken later doubtless in the fertile Vale of Aylesbury—extended from Brill on the

<sup>(</sup>e) Pearson, Historical Maps, pp. 47-52.

borders of Oxfordshire across the Chilterns to Burnham and the Thames, of which in the still wooded heights of the chalky uplands of Buckinghamshire the picturesque traces are to this day visible. The New Forest is, however, at the present time the most striking example of the mediæval forest which has preserved its continuity as a royal forest from the time of the Conqueror. It has undergone changes in form and size, but it is with us to-day the same beautiful tract of woodland, heath, and cultivated spaces as in the time of Edward I. It has continued to be part of the royal demesne-in modern language, of the property of the Crown-century after century, whereas in Epping we have a forest the soil of nearly the whole of which was granted before the reign of Henry II. in the form of manors to private persons or to religious houses, though over the entire district a particular prerogative of the Crown was maintained, and it was a royal forest subject to the forestal laws, to the preservation of the venison, the vert and the waste within its bounds.

But the absence of royal forests did not mean that the country was necessarily completely cultivated. Where they were not to be found the chase, the park, and the warren—the private preserves of noblemen where the forest laws did not exist—covered hundreds of acros except in those parts of England, such as the great district between Stamford in the North-East and Oxford in the West, where by means fair or foul the king had established a recognised forestal dominion.

When we call to mind the variety of beasts which are to

be found in half-civilised districts in various parts of the world one is struck with the limited number of animals which were preserved in the royal forests of the thirteenth century. The writer of the Introduction to the "Select Pleas of the Forest," after a careful examination of many documents relating to forests in various parts of England, thus sums up his researches on this point:—

"Thus it may be confidently asserted that there were in general four beasts of the forest, and four only—the red deer, the fallow deer, the roe, and the wild boar, the only exception being that in a few districts the hare was also made the subject of the forest laws."

The hare was indirectly preserved by the Assize of Worcester (1184), which prohibited greyhounds and dogs from being brought into the forest, not because they were likely to pursue the hares, but because their presence was dangerous to the deer. Why the hare should have been preserved in some places—as, for example, in the warren of Somerton—one cannot guess, but that it was is clear by more than one entry in the Somerset Eyre of 1257:—

"It is presented," says the record, "by the same persons and proved that on Monday in Christmas week in the forty-first year a certain hare was found dead. An inquisition was made thereof by the four townships of Somerton, Kingsdon, Pitney, and Wearne, who say that the said hare died of murrain, and that they know of nothing else except misadventure. And because the said townships did not come fully, &c., therefore they are in mercy" (f).

<sup>(</sup>f) Select Pleas of the Forest, p. 42.

There is something rather suggestive of the comic opera in four townships sitting in judgement on the hody of a dead hare. Probably it was the insignificance of the creature, as well as the serious consequences resulting to the neighbouring districts from the death of an animal of the forest, that practically prevented the hare from being a beast of the forest. Why, we repeat, there should have been some exceptional districts where the hare was preserved is a question now impossible to answer.

The mediæval forest was in fact essentially a deer forest. The nearest likenesses to it in these days are, as well as the New Forest (g), the districts in Devon and Somerset where the red deer is still protected and strays unharmed over a picturesque country, woodland, moorland, and hill pasture. The wild boar was to be seen too, but already, by the middle of the thirteenth century, it had become scarce. There are entries in the Gloucestershire Rolls of 1258 which tell of its preservation and unlawful slaying, but from a point which may be taken at this particular date the wild boar is scarcely mentioned.

The wolf, as one can well believe, was as much a poacher as any hungry outlaw, and it is surprising that Manwood should have included it in the list of beasts of the forest. For the object of those in charge of the royal forests was, from an early date, to destroy an animal which in the winter was as injurious to the deer as to the men who lived in the cottages or hamlets adjacent to a

<sup>(</sup>g) For an account of Wolmer Forest see Rural Life in Hampshire, Chap. IV., "The Royal Forests," by W. W. Capes. London: 1901.

forest. Thus from the thirteenth year of the reign of Henry II. a hunter received an angual allowance, charged upon the Sheriff's farm, for hunting wolves in the county of Worcester, and by letters patent issued in 1281 the king directed a hunter named Peter Corbet to take and destroy all wolves in the counties of Gloucester, Worcester, Hereford, Salop, and Stafford. These are but two instances; they show, however, systematic endeavours to exterminate a noxious animal.

Another beast, harmless in itself, occupies a somewhat curious place, and that is the roe deer. It was a beast of the forest during the thirteenth century, but at this time it was decided that it ought not to remain in this category because it drove away other kinds of deer. In the eye of the forester it occupied the same position as the harmless chub does in a well-managed Hampshire trout fishery. The most suggestive point about this exclusion is that it was arrived at by a legal decision, so that no example could better indicate the importance of the law of the forest. In the Middle Ages, the decision was given in the reign of Edward III. by the Court of King's Bench. Henry de Percy put forward a claim to have woodwards carrying bows and arrows in his woods in his manor of Seamer, which was within the forest of Pickering, and also to have the right of hunting and taking roes, as well within the covert of the forest as outside. The Earl of Lancaster, to whom the king had granted the forest and all his rights over it, opposed the latter of these claims on the ground that the roe was a beast of the forest, and that the right demanded was against the assize of the forest. The justices in eyre adjourned the claim for consideration to the Court of King's Bench. This tribunal, after consultation with the great officers of state, and after diligent deliberation, delivered its judgment, with the conclusion: "Caprioli sunt bestie de warenna et non de foresta eo quod fugant alias feras de foresta." Roe were not beasts of the forest but of the warren, and for the practical reason that they caused other kinds of deer to leave the woods.

The protection of the deer in the royal forests necessarily involved the indirect protection of other wild animals, such as hares, and of numerous kinds of wild birds; for a man who wandered in the woods of a royal forest to net a partridge was likely to disturb the deer, and so could be stopped by the foresters. indirect protection, as time passed on, produced a general preservation of game—to give it the modern name—sufficient to cause the writers of an age later than the thirteenth century often to suppose that such birds as the partridge or the mallard were birds of the forest. But all the creatures other than those already enumerated were beasts or fowls of warren, a place wholly distinct from a forest, and neither under the jurisdiction of the forest laws nor the supervision of the officials of the forest. Over every portion of the waste of the countryside or of the unenclosed demesne land of a private individual the poorest peasant could roam in pursuit of animals at will until a grant of warren was made by the king. From the moment, however, that by virtue of his royal prerogative the king granted the sole right to hunt other than forestal animals to a private individual within the bounds mentioned in the grant, a warren was brought into existence, giving to private persons either a new property or a privilege in addition to the ordinary right of ownership, which they did not before possess. Out of unenclosed land the king could of course create a warren for himself, and sometimes he would indirectly nullify the effect of the Charter of the Forest by creating warrens in a disafforested district. One, indeed, of the articles of the barons' petition in the Parliament of 1258 demanded a remedy because out of the disafforested districts warrens were created which were contrary to the public rights granted by the That a warren was wholly distinct from a forest is shown also by a suggestive decision which is recorded in the Rolls of Hilary Term, 1287, in which, in an action of assault against a warrener, the latter pleaded that the plaintiff's men were hunting in the abbot's warren. The plaintiff in his reply to this defence averred that he was in pursuit of a buck in a place where all the country could hunt. In the result, though it was proved that the spot was a warren, it was held that the defendant should be in mercy because the buck was not a beast of the warren. But we must repeat that this difference necessarily became obscure in course of time, and was undoubtedly affected by local circumstances. For the king could grant away one of his forests or a part of it to a private individual; thereupon a chase was created—in other words, a tract of country once part of a royal forest, but free from the forest law, yet at the same time a preserve of deer and of woods, for the pleasure and the benefit of the king's grantee. In some places warrens may have become united with forests; in others as the royal authority over the forests grew weaker, deer would be



preserved by private persons in their warrens, with the result that a local historian might very well state that other animals and birds were forestal which originally were not really forestal creatures.

The existence of a forest brought into being a host of officials, to each of whom the forest meant his own continuance in power and prosperity. They were the civil servants of the Middle Ages, conspicuous over a large part of England, and constant reminders both to the secular and the ecclesiastical lords, as well as to every peasant, of the power of the Crown. We may almost regard them as in the same position as the Government officials in modern France, who are to be found in every country town. Nothing was easier than for them to become petty tyrants and to extort money for themselves as well as for the king. Norman Sampson, the riding forester, under Geoffrey of Childwick, steward of the forest of Huntingdon in 1255, was one of this kind, and he thus figures in the Huntingdon Eyre of 1255. It is "presented" that he "took a certain man at Weybridge who was with the parson of Colworth, . . . and he took the said man to Houghton to the house of William Dering his host, and he put him upon a harrow, and pained him sorely, so that William gave to him twelve pence that he might be released from the said pains, and afterwards he gave to him five shillings that he might by his aid be able to withdraw quit. It is also presented by the same persons of the same person that a certain Norman, his page, and he himself were evildoers to the venison of the lord king, and that Norman Sampson sold three oaks in Weybridge and committed many other trespasses while he was a forester "(h). And so, after various proceedings, Norman Sampson is fined two marks. Imagination is not needed to picture this little drama—the poor man brought to the farm and cruelly and ingeniously tortured, the money paid to the brutal forester, who, unpopular among his fellows, is himself brought before the justices in eyre and fined in his turn. There were many grades of forest officials, and one may be sure that there were not lacking official disagreements and personal jealousies.

In 1238 England, for the purpose of forest administration, was divided into two provinces—one north and one south of the Trent, and over each of these two departmentsthere was placed a justice of the forest. The title is a little misleading, since it suggests a legal rather than a ministerial officer. These personages were, in fact, head foresters. Mathew Paris actually speaks of one of these men as summus anglie forestarius, as well as summus justiciarius foreste, and the first description better explains their functions; for except that it was part of their duty to release on bail prisoners who were in custody, they had no judicial functions, and "in general carried out all the executive work relating to forests." For a time, at the beginning of the fourteenth century, these men seem to have been called wardens. but by the year 1377 the old designation was resumed. manage a tract of country so immense as that over which their jurisdiction extended was obviously beyond the power of two officials, and deputies were therefore appointed, either by the justice himself or by the king.

<sup>(</sup>h) Select Pleas of the Forest, p. 20.

The justices "were usually men of considerable political standing. . . . By the end of the fourteenth century the office evidently became a sinecure, being then usually held by a nobleman of rank. But though a sinecure the income attached to it was certainly not derived solely from an official salary, for from the close of the thirteenth century the justices of the forest south of the Trent received from the king an annual payment of a hundred pounds only, and the salary of the justices of the forest north of the Trent was only two-thirds of that sum."

Whether the lieutenants of these men were not also called wardens seems not to be so certain as the editor of the Selden Society's volume considers. In a state of society so rude as that of mediæval England, and in country, districts, a strict division of offices is difficult, and the editor remarks that the wardens, whom he places as next in authority to the justices, "were variously described in official documents, and seldom expressly as wardens; but the word may conveniently be used to avoid ambiguity." A desire to avoid ambiguity sometimes tends to false impressions, and as the warden was the person who had the custody of a single forest it is not clear why he could not have also been the local deputy of the head forester. Sometimes in documents he was called steward or bailiff or chief forester; sometimes he was appointed for life, sometimes his office was hereditary, but whatever his title he was the local as distinguished from the general ministerial representative of the king. Their position often made these men tyrannical to the last degree, and nothing made the laws of the forests and their administration more hateful to the general body of the English

people—for there was scarcely a district where they had not some jurisdiction—than the misdeeds of these officials. In the Rutland Eyre of 1269 a long description is given of the wrongdoings of Peter de Neville, who seems to have been one of the worst behaved of these men:—

"The same Peter imputed to Master William de Martinvast that he was an evil doer with respect to the venison of the lord king in his bailiwick (balliva), and he imprisoned him at Allexton on two occasions, and afterwards he delivered him for a fine of one hundred shillings which he received from him; for which let him answer to the lord king, and to judgement with him because he delivered the aforesaid Master William without any warrant. . . .

"The same Peter charged Henry Gerard with a certain trespass to the forest, and took his beasts and detained them until he had paid him half a mark for their delivery and five shillings for their custody" (i).

In fact, the said Peter de Neville acted dishonestly by his lord and unjustly to his neighbours, and the long tale of his many crimes gives a complete picture of individual forestal tyranny. He had his herd of three hundred pigs digging in the enclosure of the king, and he took money and kind from those who dwelt about him, and actually made a gaol at Allexton, in Leicestershire, which, says the roll in question, "is full of water at the bottom, and in which he imprisoned many men whom he took, lawfully and unlawfully, by reason of his bailiwick in the county of Rutland, and he delivered many

<sup>(</sup>i) Select Pleas of the Forest, p. 49.

of them at his pleasure and without warrant." Such were the evil doings of Peter de Neville—capitalis fore-starius Foreste comitatus Roteland—at the end of the reign of Henry III.

The active work of the forest was entrusted to men who safeguarded the venison and the vert, the deer and the greenwood, the timber and the underwood, who prevented poaching and watched for encroachments on the dominion of the king, and collected dues—the foresters, the verderers, and the agisters.

There were riding foresters and walking foresters, and pages, all appointed and paid by the warden, the custodian of the forest, if they were remunerated at all, but more often than not they actually paid the custodian of the forest for their place. The result was the existence of another rapacious class, who made their living from their poorer and less powerful neighbours, and accentuated what, in the Middle Ages, was an extreme social grievance of the people. Of this state of affairs we obtain a picture, the truth of which is undoubted, in the complaints against the Charter of the Forest, which were formulated by the men of Somerset:—

"3. Although the charter says that view of the lawing of dogs ought to be made every third year when the regard is made, and then by view of loyal men and good, and not otherwise, yet the foresters come through the towns blowing horns and making a nuisance with much noise to cause the mastiffs to come out to bark at them; and so they attach the good folk every year for their mastiffs

if the three toes be not cut and a little piece from the ball of the right foot, although the charter says that the three toes are to be cut but not the ball of the fore foot.

- "4. Although the charter says that by view and by oath of twelve regarders, when they make their regard, as many foresters are to be set to guard the forest as to shall seem reasonably sufficient, yet the chief forester sets foresters beneath him, riding and walking, at his pleasure without the view of anybody, and more than are sufficient to guard the lawful forest, in return for their giving as much as they can to make fine for having their bailiwicks, to the great damage and grievance of the country because of the surcharge of them and their horses and their pages, although the king has no profit and no demesne, except one wood which is called Brucombe in Selwood; and he takes there for herbage of that wood from the neighbouring towns sometimes two shillings, sometimes three shillings, or sometimes four shillings, although no money ought to be taken for herbage according to the charter.
- "5. Although the charter says that no forester or beadle shall make scotale, or collect sheaves, or oats, or other corn, or lambs, or little pigs, or shall make any other collection, yet the foresters come with horses at harvest time and collect every kind of corn in sheaves within the bounds of the forest and outside near the forest, and then they make their ale from that collection, and those who do not come there to drink, and do not give money at their will are sorely punished at their pleas for dead wood, although the king has no demesne; nor does anyone dare to brew when the foresters brew, nor to sell ale so long as the foresters have any kind of

ale to sell; and this every forester does year by year to the great grievance of the country.

"6. And besides this they collect lambs and little pigs, wool, and flax, from every house where there is wool a fleece, and in fence months from every house a penny, or for each pig a farthing. And when they brew they fell trees for their fuel in the woods of the good people without leave, to wit, oaks, maples, hazels, thorns, felling the best first, whereby the good people feel themselves aggrieved on account of the destruction of their woods; nor does any free man dare to attach any evil doer in his demesne wood, unless it be by a sworn forester. After harvest the riding foresters come and collect corn by the bushel, sometimes two bushels, sometimes three bushels, sometimes four bushels, according to the people's means; and in the same way they make their ale, as do the walking foresters, to the great grievance of the country" (k).

The zealous forester was no respecter of persons, and his duty sometimes brought him into conflict with the Church and with noblemen. A quaint tale in the Huntingdon Eyre tells how the suspicion of the foresters fell on one Gervais, of Dene, who was seized by them and placed in Huntingdon gaol. Presently there came to the foresters several chaplains of Huntingdon, and the bailiff of the Bishop of Lincoln, with book and candle, intending to excommunicate them; they also demanded the prisoner, as a servant of the bishop, but the foresters, in this dilemma, declared that once the man was im-

<sup>(</sup>k) Select Pleas of the Forest, p. 126.

prisoned they had no power to release him. Still, they all went to the prison, and took off the man's cap, and "he had the crown of his head freshly shaven, whence the foresters suspected that it was shaved that day in prison. And the said Gervais went to his harness, and took it and went home," and so the Church prevailed. In this simple narrative we see abundant elements of strife, of sharp conflicts between delegated royal power and delegated ecclesiastical power, of the subjects which engaged the minds of men in rural England in those faroff days when the great cathedrals were rising over the land, and two forces—for the instance given is but one of many—were constantly in collision.

Besides the king's foresters there was a co-operative official, the woodward, appointed by the owner of land within the bounds of the forest, who, while he safeguarded his master's interests, had also to be a game-keeper for the king—a private forester sworn to protect the king's rights. The ranger we may pass over; his duties are obscure, and it was only when the forest system was in process of dissolution that he came into notice. Probably the word was intended to denominate some particular individual, and not a class.

The verderer was in many respects the most important official of the forest, since it was his business to keep watch and ward over the timber; he was responsible to the king and not to the wardens, and he was appointed by the county court, the elections being made upon receipt by the sheriff of the writ de viridario eligenda. The position, as can be well understood, for the verderer was the direct link between the royal exchequer and a great

body of taxpayers, was one of responsibility, and was usually filled by a knight or a landed proprietor, while the numbers allotted to the forest varied according to its size and importance. "The chief work," says the editor of the "Select Pleas," "in which the verderers were engaged was that of attending the forest courts." This description hardly does justice to the importance of these officials: it might be supposed that they were merely spectators; but the verderer attended at the forest assemblies to report and to justify his conduct in his office. In the Nottinghamshire Eyre of 1334 there are some suggestive entries in regard to verderers:—

"Of the same verderers," runs the roll, "because they did not produce the rolls of the attachments of Linby, Bulwell, Calverton and Edwinstowe for the same year; in mercy, ten shillings. . . . Of the verderers of the eighteenth year of the same king for the price of the vert of the attachments of Bulwell, &c. . . . seventy-two shillings and ninepence" (l).

In the same roll we find numerous entries such as this: "Of Ralph the son of Reynold of Edwinstowe for an oak of the price of tenpence wherewith the verderers are charged in the roll of the price of the vert"; and in the Nottinghamshire Eyre of 1287 it is told how William de Vescy and his fellow justices in eyre in 1286 found that in the forest of Sherwood the king had sustained losses of many kinds, and so they provide that all the verderers of Sherwood are to assemble every forty days "to

<sup>(1)</sup> Select Pleas of the Forest, p. 68.

hold, as is contained in the Charter of the forest, attachments both concerning the vert and the venison." The functions, indeed, both of verderers and foresters, appear by no means always to be distinct. Thus in the same document the justices direct that if anyone fells a green oak to the ground he is to be bound over to come to the next attachment, and his mainour is forthwith to be appraised by the foresters and verderers, and he is to pay the price to the "verderers in full attachment." It is therefore by no means surprising that as time went on, the forest officials became somewhat confused, both in nomenclature and in duties, which varied according to local needs and local habits.

Three important sources of forestal revenue were from assarts, purprestures, and wastes-in other words, from payments in respect of acts which became more necessary and more numerous every year. To uproot the trees and reduce a piece of wilderness to cultivation, to sow it with wheat and oats, was an offence against the forest laws if such space was within the bounds of a forest. It became an assart, and not only for the original trespass a fine had to be paid, but also for each succeeding crop, and as the justices in eyre came round the forests the tenants who were under this obligation brought to them what were in fact rents. But a mere payment did not always suffice, and the labour of reclamation might be destroyed. Roger de la Holte, says a roll, assarted a piece of land of certain dimensions, and he enclosed it with a ditch and a low hedge; therefore he is in mercy. Let the land be taken, the hedge and ditch removed. To the destruction of industry was oftentimes added the punishment of a

fine. Sometimes a man within the bounds of the forest would enlarge an enclosure, even though the land appropriated was not part of the king's demesne, or he would make a fishpond, or build a mill. William de Berdeley without warrant enlarged his enclosure at Barndeleye by ten perches in length and ten feet in depth, and he enclosed it by a little ditch and a low hedge, so he was in mercy and the enclosure demolished. This was a purpresture, and, like the assart, the king generally derived from it a more or less continuous revenue. In the same way, if a tenant desired to protect his arable land against wandering deer, and enclosed it with a fence, this again was a purpresture. Richard Carettarius, the carter, who lived near Evesham, made a hedge and ditch around his "Clausum prosternatur" concludes the roll. field. Robert de Mep occupied half an acre of land, and he guarded it with a hedge and a ditch without the leave of the king, and he died, and Alice his wife held the land after her husband, and again we read the suggestive and despotic words "Terra capiatur, clausum prosternatur." Tenants of woods within the forest had a right to cut wood for fuel and for the repair of their property, the extent and manner of the right varying according to custom in different localities, but any infringement of it, however vague might be the original right, was an offence against the laws of the forest. It was waste, and for this the offender could be fined.

These three kinds of trespasses it was the business of the regarders to note. Twelve knights chosen for the purpose made the inspection, the visitatio nemorum, once in every three years. Their report, in the form of answers to

certain questions, the Chapters of the Regard, was duly enrolled, and when the justices in eyre came round, among those who had to appear before them were the regarders with the regards.

The agister may perhaps be called the rent collector, who collected "money for the agistment of cattle and pigs in the king's demesne, woods, and lawns," receiving it after he had counted the beasts which had entered the forest.

But officials of the forest were only a part of the extended forestal system of mediæval England. A complete and elaborate series is visible of what, for convenience, may be called courts. For the purpose of protecting the venison there were forest Inquisitions, Special or General, the former being inquiries into the death of a beast of the forest, held immediately after the finding of the animal, or into any presumed infringement of a forest law. To these the four neighbouring townships had to answer, common responsibility for the acts of the inhabitants resting on the whole district. An example will show the working of the practice, which is remarkable for the stubborn pretence of ignorance which was constantly shown by the commune; the popular interest was always adverse to that of the king. The first is from Essex:

"On the Saturday next before the Nativity of the Blessed Virgin in the twenty-sixth year of the reign of Henry William Wayberd came into Horsfrith, and saw there Hawe le Scot and three others with him with bows and arrows; and he did not recognise them; and he left them and went to Roger of Wollaston the forester, and showed him how he found them. And he, taking his men with him, searched the aforesaid wood, and could find nothing. And upon this the foresters and verderers assembled, and made an inquisition thereof by four neighbouring townships, to wit: Fingrith, Abbess' Ing, Queen's Ing, and Writtle.

- "Fingrith comes and says that it knows nothing of malefactors to the forest nor of persons harbouring them.
  - "Abbess' Ing says the same.
  - "Queen's Ing says the same.
- "Writtle comes and says that it heard from William Wayberd that on the Friday next after the Nativity of the Blessed Virgin in the same year he saw two dogs running after a buck, which they worried to death, one being black, the other brindled, and he pointed this out to Roger of Wollaston the forester" (m). Here is yet another picture:—

"In the thirty-second year of the reign of King Henry on Ash Wednesday, an inquisition concerning a fawn, which was found dead and wounded with an arrow in the wood of Brampton, was made by four townships, to wit, Brampton, Ellington, Grafham, and Dillington, which all say that they knew nothing thereof.

"In the same year on the Thursday next after the feast of Saints Tyburcius and Valerian an inquisition concerning a certain beast, which was taken in the meadow, and of which the entrails were found, was made at Weybridge by four townships, to wit, Alconbury, Woolley,

<sup>(</sup>m) Select Pleas of the Forest, p. 79.

Ellington, and Brampton, which all say that they know nothing thereof "(n).

The desire for uniformity of description may well incline us to consider the General Inquisition, or the swanimote as it was sometimes called, as distinct from the Special Inquisition, because it was held for the purpose of inquiring generally into trespasses against both the venison and the vert, and was held also at intervals. But it appears to have been the natural concomitant, for the purposes of convenience, of the Special Inquisition, and of the Attachment Court—a court which, for its own particular purpose, that of protecting the vert only, may be regarded as subsidiary to the Special and General In-The Attachment Court was a tribunal quisitions. "which, sitting at regular intervals, usually every sixth week, was chiefly concerned in trying cases of small trespasses to the vert," as for cutting saplings under the value of fourpence, or branches from oaks, hazels, and similar trees. When the case was too serious to be decided by the Special or General Inquisition, the offender was bound over to appear before the Justices in Eyre; but the gravity of the act of which he was accused depended often on locality, and sometimes on the position of the offender. In the extracts from the Sherwood attachments there are many instances of the working of this portion of the forest laws. A man is fined eighteenpence "pro uno stubbe"—for a pollarded tree—doubtless carrying some of it away for firewood; in another part of England and in another court a man is fined threepence "pro una

<sup>(</sup>n) Select Pleas of the Forest, p. 74.

blestrone"—a sapling: whether he cut it down or whether he merely damaged it we cannot tell, but in most cases we surmise the injury was partial rather than complete.

These lesser courts, however, all led up to that which was supreme in the forest, the court of the Justices in Eyre, who, as stated at the beginning of this chapter, were itinerant justices appointed by the king's letters patent to hear and determine pleas of the forest in a particular county or group of counties, seven years, as in the case of pleas of the Crown and common pleas, being the normal period which clapsed between eyre and eyre. The justices sat in some important town not far from a forest region, as at Oxford, for Shotover and Bernwood, and at Northampton, for Pakingham and Cliffe. They formed not only a court of law, but a court of supervision. This tribunal considered the conduct of foresters and verderers, and if necessary punished them, as well as those who had offended against the forest laws; it dealt with the more serious offences against the vert, as the Attachment Court did those which were of smaller moment; and it fined those wrongdoers who lay in prison awaiting its decision. According to the Charter of the Forest, if a man were seized and convicted of taking venison, he was to be ransomed in a heavy sum, and if he had no means of paying a fine, he was bound to lie in prison for a year and a day; if after that period had elapsed he could find pledges he was to be allowed to come out of prison, but if he could not, then he was to abjure the kingdom. It seems that the question of ransom was a matter for the Justices in Eyre, and that on being first seized

and convicted an offender must either remain in prison until the itinerant justices should arrive in the locality (unless, which often happened, he died), or find pledges for his future appearance.

Of the general course of procedure of these supreme forestal courts, we have a picture in one of the rolls of Surrey. This is obviously a mere précis of proceedings, but its brevity enables the different steps to be followed, though in reading it we must allow for the lapse of spaces of time. "It is presented and proved," begins the roll, "by the verderers and by twenty-four good and loyal men of the town of Guildford or of the parts adjacent to it, and by many sworn townships that Robert King, Peter Long, William atte Hedge, who is dead, Ralph atte Slough, who likewise is dead, and John, the son of Henry atte Down, who were workmen in the park aforesaid repairing the paling of the same park, felled several oaks for making palings thereof. And when the deer of the lord king came to browse on the little branches of the aforesaid oaks, they stretched snares for taking them. And on the morrow of All Saints in the fourty-fourth year, Bartholomew the parker came up and found the aforesaid evil doers with the aforesaid snares stretched: and he took them and delivered them to William la Zouche who was then sheriff of Surrey for imprisonment. And afterwards by the order of Thomas of Greasley, then the justice of the forest, they were delivered on bail until the next pleas of the forest. The aforesaid William and Ralph, who are dead, were essoined the first day of death; therefore their pledges are quit. And the aforesaid Robert, Peter, and John came, and being convicted of this are detained in prison. Afterwards the aforesaid

John atte Down, being brought out of prison, made fine by half a mark by the pledge of John of Garkem . . . and William, the son of Clement of Worplesdon. Afterwards came Robert le King, and, being brought out of prison, made fine by half a mark by the pledge of Robert of the park and William of Apecroft. And the aforesaid Peter, being brought out of prison, made fine by half a mark by the pledge of Richard of Aldbourne and Andrew atte Hook" (o).

Here again is a shorter story. "It is presented (June 25, 1269) by the same persons (the chief forester, and the verderers of the County of Rutland) and proved, and also by the regarders and twelve knights and other free and loyal men that when the lord king gave James of Pauton two does in the forest aforesaid, the same James took six does, whereof four were without warrant. And by reason of the noise which he made by beating drums (taborando) when he beset the does many beasts came out of the forest and were taken to the loss of the lord king and the detriment of the forest. And the aforesaid James comes, and being of this proved, is detained in prison" (p).

As we have seen in describing the regarders, one duty of these officers was to bring their reports before the Justices in Eyre for them to take action. In the Huntingdon Eyre has been bequeathed to us a little tale of a purpresture and its consequences, which in its simple narrative is more instructive than are pages of comment:—

<sup>(</sup>o) Select Pleas of the Forest, p. 55.

<sup>(</sup>p) Ibid. p. 14.

"It was ordered by Robert Passelewe and his fellowjustices last in eyre here for pleas of the forest that the houses of Vincent of Stanley which had been raised to the nuisance of the forest should be pulled down; and the doing of this was hindered by certain persons, Colin of Merton and Richard of Toseland, the bailiffs of Philip of Stanton the sheriff of Huntingdon. And the verderers witness that when they and the foresters came to pull down the said houses, as they were ordered, the said Colin and Richard of Toseland prohibited them from pulling them down. And when the foresters laid their hands on the said houses to unroof and pull them down, the said Colin and Richard forcibly drove them back, saying that they would not in any way allow them to pull them down, because they had the precept to that effect of Philip of Stanton, who was then the sheriff of Huntingdon. And the verderers and foresters went to the same sheriff, and told him the nature of their precept concerning the houses to be pulled down, and how they were hindered by his bailiffs aforesaid by his precept. And the said sheriff said that they had no order thereof from him, and disavowed their deed entirely; whereby the order of the justices and what was for the king's advantage concerning the aforesaid houses to be pulled down remains And therefore the sheriff is ordered that he cause the said Colin and Richard to come from day to day. Afterwards Richard came; and he could not deny that he impeded the said foresters and verderers as is aforesaid, and this without warrant; therefore he is in mercy" (q).

<sup>(</sup>q) Select Pleas of the Forest, p. 18.

The names of some of these courts and officials are familiar to many; some years ago indeed, when public rights over the remnants of English forests were in dispute, they were often on men's lips. But they had become mere fragments of a great system, little more than useless relics of a once living past—a past which was most perfect and complete in these respects after the passing of the Charter of the Forest. The system at its zenith was at once elaborate and effective. Its inferior and superior criminal courts differ little in symmetry from those of modern days, and the justice which was administered in them was in the eyes of the people essentially important, touching the interests of every man in the realm from the king to the poorest peasant.

The striking feature of the forest laws was the manner in which they harassed every class of the community in the rural districts. It was not, however, their harshness which offended the people. That there were cruelties in their administration before the Charter of the Forest is undoubted, but it was a rude age, and life was held cheap. In their zenith—as we have already said—they were not cruel laws, and they were not generally harshly administered, for the higher officials were often themselves men of position in a locality, and in sympathy with some at any rate of its inhabitants; to brand them with severe epithets is to show ignorance of facts. Their sting lay in the way in which a dweller in the country was met by them at every turn, even the smaller towns were not free from the intrusion of the forester, and the traveller peacefully passing through a forest district might be arrested on suspicion. That the forests needed guardianship and regulation was undoubted, for they were at once the depôt, not only for fuel, but for timber for every purpose, for the building of ships and the erection of houses. This care would not in itself have caused a popular dislike of forest laws and officials; but it produced—necessarily perhaps—a multitude of offences against the laws of the forest and continual intrusions into the daily life of the humblest peasants, which became more vexatious as the population of rural England increased in numbers and in wealth.

In a sketch of the elaborate forestal system of mediæval England, one can but glance at its laws, its courts and its officials at the time when it was strongest and most clearly defined, and suggest its effects on the domestic politics and the society of the age. But the longer it is considered, the more important it appears. For the preservation of the forests and of the animals which roamed in them there grew up courts and judges great and small, as well as laws and rules which occupy a large space in the law and procedure of a remote age, and of which remains are to be found to this day. The system interfered with two of the chief necessaries of life among the rural population—their food and their firing. placed the sovereign and his servants in constant antagonism to all classes of the community, whether lay or ecclesiastic, whether they lived in a castle or a cottage, in county towns or villages, which lay near the margins of his forest, and it was a continual barrier to the extension of agriculture, and so of civilisation. It emphasises the character of individual right to property in land in mediæval England as distinguished from the right of the

commune which prevailed in some parts of Europe-for the king was the chief landowner in the country, and when he parted with his right over a forest it devolved, not on a body of the people, but on a nobleman only less powerful than himself; and it demolishes altogether the idea which yet sometimes is evident in political discussion on modern land tenure—a theory so completely at variance with historical truth-of the inherent right of every individual to a portion of the land of the kingdom. In a word, from the time of the Conqueror to the nineteenth century, the royal forests have been the cause of a conflict between two opposing systems of land tenure. The right of the individual and the corporate right of the community to the forests have been in constant. antagonism, the right of the individual prevailing everywhere; for in the places where others than the king and his grantees have obtained rights in the forest by virtue of custom, it has been as individuals, and not as members. of a community which was capable of enjoying rights of property. The only way in which the village or the township was recognised by the forest laws as having a corporate existence was in the unpleasant form of a liability of a township for offences committed by individual inhabitants against the forestal law. Nor havethe effects of the forest laws yet disappeared from the social life of England. For the game laws, by which the killing of certain birds and animals is a criminal offence, apart altogether from the offence of trespass on land, arethe offspring of the mediæval laws of the forest, and they have continued to estrange classes in the rural districts, and have ruined the life of many a peasant.

## CHAPTER III.

## THE LAW REFORMS OF THE COMMONWEALTH.

Among the remarkable features of the epoch of the Commonwealth not one is more deserving of attention than the important place which law reform suddenly occupied in the midst of great political and social events. By the constitutional changes which had previously occurred, the municipal law was not affected. Yorkists succeeded Lancastrians, and Tudors followed Yorkists; the Reformation transformed the national religion. but the fabric of English law remained unaltered. The period, however, of the Rebellion and the Commonwealth is in striking contrast in this respect to the larger portion of English history, and from 1648 to the Restoration of Charles II. in 1660 is a strange epoch in the tranquil legal annals of this country. Several important changes and improvements actually occurred, and a far larger number were proposed but never completed. An eagerness for this kind of reform was visible, and a vague activity in the Legislature to fulfil the national wish, stimulated as it was by the strong will of Crom-The lay element in the nation was determined, if possible, to improve the law of England whether lawyers liked it or not; and the foremost man of the time not only heartily sympathized with the national desire, felt as it was by all classes of the community from Independent colonels to Tory Devonshire squires, but, in the maturity of his opinions and from the thought which he had given to the subject, was prepared at once to lead and to guide the more headstrong and less thoughtful multitude. So that law reform, far from being the object of a few specialists or a knot of advanced thinkers, became a political object of unusual popularity and of constant importance.

No doubt, this wish for a more equitable system of law and procedure arose partly from the existing defects of English law, especially in regard to matters of procedure. Thus, in his speech at the opening of the Second Protectorate Parliament, on September 17, 1656, Cromwell said: "There are some things which respect the Estates of men; and there is one general Grievance of the Nation. It is the Law. Not that the laws are a grievance, but there are laws that are, and the great grievance lies in the execution and administration" (a).

In other words the feeling for legality so strong in the English race was offended by technicalities in the administration of justice. It was a time when a spirit of unrest and a determination to improve the religious and political state were in the air, and it was impossible that the law could escape reform in the general overhaul. But the way in which it was to be accomplished was characteristic of the English people. They had no theoretical or visionary reforms in view, but whilst preserving the existing system, they wished to rid it of abuses.

Oliver Cromwell's Letters and Speeches. London: 1871. Vol. IV. p. 209.

It ceases, therefore, to be a matter of wonder that this particular epoch stands alone, remarkable for unusual activity and progress in the matter of law reform. is equally noteworthy, however, that, in spite of this favourable current of circumstances, but few reforms were actually carried out, compared with the number of projects which were discussed. This arose from two causes. The first was certainly the inherent difficulty of the question; for no subject is less capable of hasty alterations than the law, and there is not one which opens out more vistas of difficulties and doubts, as progress is made, than a reform of even a single branch of the law. Secondly, it was caused by the conservatism of the lawyers, who, not being in sympathy with change, could act as a most effectual drag upon the progress of law reform. that while one may sympathize with Cromwell's lament over the slowness with which law reform proceeded, it is scarcely possible to lay this delay to the doors of the Long Parliament as he did, probably for political reasons, in a memorable speech at the opening of the Convention or Little Parliament on the 4th of July, 1653. "I will not," he exclaims, "say that they (the members of the Long Parliament) were come to an utter inability of working reformation, though I might say so in regard to one thing: the reformation of the law so much groaned under in the posture it is now in. That was a thing we had many good words spoken for; but we know that many months were not enough for the settling of one word 'Incumbrance'" (b). And even those much-needed changes which these years of turmoil witnessed were

<sup>(</sup>b) Cromwell's Letters and Speeches, Vol. III. p. 211.

blotted out at the Restoration, the actual results were lost, the labours of vigorous law reformers were thrown away, and the English nation had to wait for another century before the ideas of the parliamentary reformers at length improved and popularized the body of English law. But even as this period stands, barren of permanent results, it is deserving of some study in detail, if only for the exceptional place it takes when compared with other parts of our legal annals.

The distinctive character of the law reforms of this part of the seventeenth century was that they consisted almost wholly of attempts to improve procedure, and not to change the body of the law. As we have already seen, Cromwell distinctly stated to the Parliament of 1656 that it was not the laws which were a grievance, but their execution and administration. Some of the more thoroughgoing of the reformers, it is true, advocated very wholesale measures—such as the abolition of the Court of Chancery (c); but the English people never desired anything so revolutionary, and would have been satisfied if legal redress could be easily and cheaply available. was such practical objects as that for which the grand jury of Devon petitioned (d)—that all legal proceedings should be in English and not in Norman-French or cramped Latin-which were the aim of the people, not drastic changes in the jurisprudence of the country. The people understood clearly enough that procedure might be either an assistance or a stumbling-block to suitors;

<sup>(</sup>c) Whitelock's Memorials of English Affairs. Ed. 1853. Vol. IV. p. 29.

<sup>(</sup>d) Ibid. Vol. III. p. 249.

and overwhelmed as English law was in the seventeenth century with innumerable technicalities in its procedure, the improvement of the latter was clearly the main object for which law reformers had to strive.

One of the first of these changes was of a thoroughly practical character, to which allusion has already been made—namely, a law that all the reports and other books of the law should be translated into English, and that all future reports should be in the mother tongue. Moreover, by the same Act, it was ordered that all writs, pleadings, and other proceedings should be in English, and should be written in a legible hand (e). To modern minds this would seem a reform which required no advocacy; but it did not pass through Parliament without considerable discussion, the Bill being supported by Lord Keeper Whitelock, second only to Sir Matthew Hale among the parliamentary lawyers, in a speech which contains many sensible sayings, but a vast deal more of ponderous and wearisome learning. But the history of this single measure exemplifies with singular distinctness the character and fate of the parliamentary law reforms. was a law useful in its scope, wholly unrevolutionary in its nature; but yet, after being in force for some ten years, it was repealed at the Restoration, and the nation had to wait for nearly seventy years after the return of the Stuarts before this desirable measure was re-enacted in words almost identical with those which were passed by the Long Parliament (f).

<sup>(</sup>e) Scobell's Acts and Ordinances, 1650, c. 37.

<sup>(</sup>f) The repealing Act was 12 Car. II. c. 3, s. 4, 1660; the re-enacting Act, 4 Geo. II. c. 26, 1731.

Another very desirable Act was placed on the statutebook to put an end to the delays and mischiefs which arose by reason of writs of error. Thus, no writ of error was of itself to stay or to supersede any execution, nor was any judgment to be arrested on account of a matter of form, but only for a substantial reason. A further clause, almost too stringent in its character, was aimed against unnecessary appeals, for by it double costs were to be awarded against a suitor who prosecuted a writ of error against a judgment which was affirmed by the appellate tribunal (g). When we consider these reforms by the light of those which were enacted by the Judicature Act of 1873 we must give all due praise to the lawyers of the Commonwealth; for the principle of these reforms was similar to those of our own day, and in some respects was nearly identical in details (h).

But another noticeable measure was passed in the same year as that ordinance upon which we have just touched. It is one of which all humane men will approve, and which again shows a clearer appreciation of the relations of the law to debtors than any measure until the merciful reforms of Sir Samuel Romilly and his successors became accomplished facts. Its object was the relief of poor prisoners, being to the effect that prisoners who have not 51. over and above necessary wearing apparel shall be discharged from durance if the plaintiff cannot show good cause to the contrary (i). Here we have a measure based on principles which the nineteenth century only has seen

<sup>(</sup>g) Scobell's Acts and Ordinances, 1649, c. 75.

<sup>(</sup>h) See Ord.: LVIII, r. 16.

<sup>(</sup>i) Scobell, 1649, c. 56.

established, and which did not receive their full development until the year 1869(k). We may say therefore either that the law reformers of the Commonwealth were two centuries ahead of their contemporaries in an enlightened knowledge of some of the true objects of a system of law, or we may, on the other hand, assert that the Restoration threw English jurisprudence back by 200 years. Be that as it may, it cannot be said when we regard these measures that the schemes of the parliamentary chiefs were revolutionary or Utopian; for these must be acknowledged to be practical and useful changes. Nor can Cromwell's reproach—which has been already mentioned—against the Long Parliament be wholly justified, any more than the criticism of a popular modern historian can be deemed quite accurate, when he states that "the Parliament appointed Committees to prepare plans for legal reforms, but it did nothing to carry them out" (1); for each one of these three measures was a distinct and substantial reform.

Besides these miscellaneous improvements, as they may be termed, two important and distinct reforms remain to be noticed. These are the changes introduced into the Courts of Admiralty and of Chancery, which had two objects. In the first case, the intention was to enlarge and to settle the extent of the jurisdiction of this maritime tribunal. The common law and the civil law practitioners and judges had for centuries disputed over this question, and it had been a constant trouble to suitors, who no sooner placed their causes before the judge of

<sup>(</sup>k) The Debtors Act, 32 & 33 Vict. c. 71.

<sup>(1)</sup> Green's Short History of the English People, p. 561.

the Admiralty Court than their opponents obtained prohibitions in the King's Bench on the ground that, except in some very limited cases, the Admiralty Court had no jurisdiction over the subject-matter of the dispute. Attempts had constantly been made to settle these differences, and an agreement had in 1632 been drawn up before King James I. and his Privy Council, which it was hoped would have brought peace; but it was unavailing, and the contest had gone on much as before (m). As regards the Court of Chancery the object of the reformers was equally plain and simple; it was to put an end to the delays which even then made this Court a byword among the people, to lessen troublesome technicalities of procedure, and to make it at once a cheap, a just, and an expeditious tribunal.

The enlargement of the jurisdiction of the Court of Admiralty was carried out in the first instance in the year 1648 by an Act which was from time to time renewed by subsequent legislation. It was so much in advance of any other attempted settlement, it put an end so boldly to the troublesome conflicts which had so long existed, even since mediæval days, that it is worthy of brief notice. It is termed "The jurisdiction of the Court of Admiralty settled" (n), and it began by reciting that many inconveniences daily arose in relation both to the trade of the kingdom and to the commerce with foreign parts, through the prevailing uncertainty as to the jurisdiction

<sup>(</sup>m) Orders were made that Admir lty causes lying under prohibitions should be tried. (Commons Journal, September 23rd, 1648, Vol. VI. p. 29.)

<sup>(</sup>n) Scobell (1648), c. 112.

of the maritime courts. It was therefore ordered that the Court of Admiralty should have jurisdiction in all causes which concerned the repairing, victualling of ships, and the furnishing them with provisions. Its jurisdiction was also extended to cases of bottomry, and, what is more noticeable, to all contracts made beyond the seas concerning shipping or navigation, and to questions as to damages arising on board ship or on a voyage. Moreover, disputes as to charter-parties, or contracts for freight, bills of lading, mariners' wages, damage to cargo, or by one ship to another, or by anchors, or arising through an absence of buoys, were to be within the jurisdiction of this tribunal, which was thus immensely and apparently permanently enlarged. This was done not by any mere agreement, but by a legislative enactment, which dealt with this matter in a more comprehensive and simple spirit than any other Act before or since that day. The obvious intention of those who framed it was that the Court of Admiralty should be the chief, if not indeed the sole maritime tribunal, dealing with all disputes arising from matters connected with shipping. And the reasons upon which this reform was based were very clearly expressed by Sir Leoline Jenkins in his speech before the House of Lords (o), on behalf of his bill to ascertain the jurisdiction of the Court of Admiralty. It is at once a justification of the measure of the Long Parliament and an indication of the loss which the mercantile community sustained by the abrogation at the Restoration of the enactments of the Commonwealth. For not only was the bill which this diplomatist and lawyer brought forward

<sup>(</sup>o) Life of Sir Leoline Jenkins, Vol. I. p. lxxvi.

in the reign of Charles II. identical with those ordinances which, to use the judge's words, were "vacated by his Majesty's most happy return," but petitions came from various quarters in favour of re-establishing the Court of Admiralty as it existed during the Commonwealth. merchants of London were so far from considering his Majesty's return happy in this respect, that more than one hundred sent up a petition to renew the system inaugurated by the Commonwealth. And it must be borne in mind that this maritime tribunal was not to supersede, but to be an addition to the ordinary courts. of the realm; for, said Sir Leoline—and his speech, as we have said and as he acknowledged, was really in defence of proposals which had existed as law during the Commonwealth-"if mariners will go for their wages, owners for their freight, merchants for their damages, material men for their money to the common law, we shall not in the least regret it, as certainly they will not, unless they find the dispatch quicker, the proceedings less chargeable, the methods of judgment and execution more suitable to their business. We desire leave to receive them and do them justice without the danger of a penal statute and without the interruption of prohibitions when once we are possessed of the cause."

Moreover, the Admiralty jurisdiction was to be executed according to the laws and customs of the sea, and three judges were appointed to deal with the expected and unrestrained business. But the vacating of the Acts of the Commonwealth by the return of Charles II. left it for the legislators of the latter half of the nineteenth century to establish permanently those parts of maritime

jurisdiction which had been given to the Court of Admiralty by the men of the seventeenth century. So that the laws of the Commonwealth which touch the Admiralty Court remain an instance of beneficial legislation which laid unseemly judicial disputes to rest for ten years, forming this short period into an epoch standing quite apart by itself in the history of maritime jurisprudence in this country.

The reform of the Court of Chancery was a very different matter to the settling of the jurisdiction of the Court of Admiralty; it was not an attempt to enlarge the powers of a tribunal not only with the goodwill but with the aid of a certain body of legal practitioners, but it was an endeavour to simplify procedure and put an end to delays which were regarded by lawyers as an essential part of the legal system of the country. the one case the garrison of the legal stronghold was favourable, in the other it was quite antagonistic to the proposed changes. Partly, it is true, this arose from a feeling which scarcely exists at the present day, and which, if it did continue until our time, has been largely broken down by recent legal changes—what may be termed an esprit de cour. The Chancery judge looked upon the courts of common law as antagonistic tribunals, and the common law judge regarded the Admiralty Court as an objectionable institution which he would do all in his power to destroy. Hence any diminution of authority, any change which would lessen the lucrativeness of a judicial post or the importance of the court—at least in the minds of the holders of the judicial offices in such court-was regarded as an attack which

must be repelled by every means, legitimate or illegitimate. Thus it was with the Court of Chancery. We have seen how Whitelock supported impersonal reforms in the shape of turning the law books into English, but when it came to improving the Court of Chancery he regarded reform as quite a different matter. Cromwell was not a revolutionary law reformer; but when in 1654 he and his Council were endeavouring to frame a reasonable measure of reform for the Court of Chancery, Whitelock, then still holding office as one of the Commissioners of the Great Seal, showed how the Protector's schemes were appreciated by himself and the body of lawyers in general by writing in his diary that "the Protector and his Council were very busy in framing new ordinances to please the people; among them they had one in consideration for regulating the proceedings in Chancery, which caused doubtful thoughts in the Commissioners of the Seal, who knew that the authority of this court was designed to be lessened" (p). The sneer at the reasons for the Protector's ordinances is fully explained by the knowledge of his power and the result which, rightly or wrongly, Whitelock imagined would in this instance be the consequence of its exercise.

But when we mention the ordinance of 1654 we have passed over a period of time the events in which have to be noted before this ordinance itself can be properly touched upon. For the attempts at reform begin with the appointment of a parliamentary Committee in 1650 (q), composed partly of lawyers, partly of political

<sup>(</sup>p) Whitelock's Memorials, Vol. IV. p. 188.

<sup>(</sup>q) October 25th, 1650: Commons Journals, Vol. VI. p. 488.

persons. Whitelock was quite the most noticeable of the former, the elder Sir Henry Vane of the latter class. One of its duties was to prepare the Act by which English should become the recognized legal language of the country; another of equal importance, was to consider the amount of the salaries of the judges and other legal officers, the posts which should be abolished, the various delays and necessary charges which existed in the system of English law; and then finally to bring in a bill to put an end to a state of things which caused complaints to arise from the nation. But, when the ideas and the position of the lawyer are considered, it need not be a matter of wonder that the duty of preparing a bill to change the law books from French into English was carried out in quite a different spirit from that which characterized the proceedings of the committee in regard to the latter part of this task-one which to Whitelock and Lisle must have seemed very like an attempt at professional suicide.

In the following year we find another Committee appointed (r)—this time comprising others than members of the Legislature—of which Sir Matthew Hale was the head. Its labours resulted in an elaborate series of draughts of proposed Acts, which were communicated to the Long Parliament and were ordered to be printed by its successor. They cover a wide field, and had they been carried into effect, and continued to exist, they would have given a wholly different character to the subsequent portions of English law. They give evidence of a determination to grapple with existing faults, and to gratify

<sup>(</sup>r) Whitelock, Vol. III. pp. 381, 385.

popular wishes with a boldness which has since hardly ever been equalled, and which must be accounted for by the fact that the lay members of the Committee, representing as they did popular opinion, were more than a match for Conservative lawyers. Any one who will spend an hour or two over the sixth volume of Somers' Tracts (s) will be surprised at the extensive changes which were proposed. For we find drafts of bills to ascertain and abolish arbitrary fines upon the descent and alienation of copyhold estates, to regulate pleaders—that is, advocates—and their fees, whose maximum remuneration was to be 5l. for a case. There is a vigorous attempt to introduce purely local tribunals for small local causes by an Act for the more speedy and easy recovery of debts and damages not exceeding 41. In these courts the judges were to be "five sufficient honest and understanding persons of the county; " and among other provisions in this same draft was a curious one that a defaulter in payment of a debt might be made to do work for his creditor to the value of the sum which he owed. There were also provisions to prevent fraudulent conveyances by means of voluntary settlements, to make debts assignable writing after notice to the debtor, to establish a registry of deeds and a county judicature, to improve the criminal law, and to establish a court of appeal consisting of seven laymen and two lawyers. Finally, an attempt was made to reform the Court of Chancery by an Act which was afterwards the basis of Cromwell's well-known ordinance.

Meanwhile, however, the Barebones Parliament let its zeal outrun its discretion. It determined to be destruc-

<sup>(</sup>s) Somers' Tracts, Vol. VI. p. 177.

It did not possess the constructive power which was necessary not only to prevent its efforts from becoming simply revolutionary, but also to produce satisfactory Thus it voted, after a single day's remedial measures. discussion, that the Court of Chancery should be abolished; but when this piece of legislative insanity was performed, ineffectual debates ensued for the purpose of preparing a measure to put some better tribunal in the place of that which it was proposed to exterminate. was easy enough, too, to pass a motion that a committee be appointed to consider of a new Body of the Law, but it was quite another thing for the committee—especially one consisting wholly of lower middle-class laymen, such as Colonel West, Mr. Barebones, and others—to revise the laws of England. No doubt, in the abstract, it was a highly meritorious work to proceed to "a reducing of the wholesome, just, and good laws into a body, from them that are useless and out of date," taking note during the process of the "nature of them, and what the law of God said in the case; " but the manner in which it was set about, the persons by whom this boundless undertaking was to be performed, and the very nature of the task itself, combined to make the whole matter a piece of buffoonery in the eyes of all sensible men (t). This was not what the people wished; it was the dream of a few unpractical fanatics; and when Colonel Sydenham immediately before its dissolution upbraided this short-lived Assembly with their desire to overturn the structure of English law and English society he did no more than give voice to the opinion of the majority of the nation.

<sup>(</sup>t) Whitelock, Vol. IV. p. 29; Commons Journals, Vol. VII. pp. 296, 304; Somers' Tracts, Vol. VI. p. 275.

Thus it was left for Cromwell himself to further reform the law. And in his ordinance, "The Jurisdiction of the High Court of Chancery limited, and proceedings therein regulated" (u), we see a reasonable attempt to satisfy the wishes of the people, which is the sole fruits of Sir Mathew Hale's Committee. To describe this statute in detail would not be a little wearisome; it is wholly one to simplify the procedure of the court, and its sixty-seven sections contain means solely for this end.

But it was not a success: it was, in fact, the cause of the resignation of Whitelock and Widdrington, two of the three Commissioners of the Great Seal; for, says the former, "in this Easter Term we proceeded in Chancery according to the former course of that court, and did not execute the Protector's new ordinance" (x). Cromwell could not brook an open refusal to obey his laws; but it is pretty evident that he did not regard this want of obedience on the part of Whitelock with any strong displeasure, since a month after he had accepted his resignation he appointed him one of the Commissioners of the Treasury. There still remained, however, Lenthal, the Master of the Rolls, who with the other judges seems to have done his best to carry out the Protector's ordinance. That it was acted upon to some extent is evident from Whitelock's own account, since he writes that the Master of the Rolls "was as forward as any to act in the execution of it, and thereby restored himself to favour "(y). On the other hand, it may be noticed that elsewhere in his

<sup>(</sup>u) Scobell, Acts and Ordinances (1654), c. 44.

<sup>(</sup>x) Whitelock's Memorials, Vol. IV. p. 204, June 6th.

<sup>(</sup>v) Memorials, p. 627.

Memoirs he mentions that "they (his and Widdrington's successors) were connived at in the non-execution of it" (z). Of course, after making all sorts of objections to the possibility of its fulfilment, he would naturally wish to see it fail. But we may well believe that, like many legal measures in our own day, it would partially work, at any rate. While some portions became the existing practice others were found to be scarcely workable. Their non-execution was wisely and prudently passed over by the Protector as unavoidable, for if, as Lord Morley writes, he had shown more zeal than discretion at the inception of these legal changes, he had the good sense to appreciate the difficulties of the task, and to make the best of a troublesome position.

With this ordinance the effectual reforms of the Commonwealth end; but up to the very year of the Restoration projects for the improvement of the law were continually under discussion. In 1656, 1657 and 1659 (a), changes in the law were the subject of debate in the Commons, and as has already been pointed out, they were referred to with much force in the Protector's opening speech at the meeting of his second parliament in 1656. Nor was Cromwell undesirous of improving the criminal law of the country, though we do not find that the wishes he expressed ever bore fruit in his time. "To hang a man," he exclaims, in his own peculiar style, "for six and eightpence and I know not what, to hang for a trifle and acquit murder, is in the ministration of the law through the ill-framing of it," and he concluded this

<sup>(</sup>z) Memorials, Vol. IV. p. 201.

<sup>(</sup>a) Commons Journals, Vol. VI. p. 485; Vol. VII. pp. 256, 734.

part of his address, after dilating somewhat more upon the subject, with an almost passionate appeal to his Legislature, "I hope it is in all your hearts to rectify it" (b). Cromwell, indeed, stands alone among the rulers of England as the one who endeavoured systematically to alter for the better his country's laws, and who felt a personal interest in the improvement of English jurisprudence. In his individual influence on legal reforms he resembles another great general—the first Napoleon. Each perseveringly urged on the desired changes, but Cromwell controlled the impracticable schemes visionary enthusiasts by his strong will and equally strong common sense; while Napoleon, on the other hand, sought in these reforms for his own personal glorification and for personal advantages, hampering rather than forwarding the plans of the jurists by his intervention in the legal discussions. The politicians, too, who in the Barebones Parliament voted the abolition of the Court of Chancery have their counterpart in the democrats who on the 3rd Brumaire of year II. reduced the whole of the civil procedure of France to seventeen short articles. But in this comparison it must also be noticed that, while Cromwell's reforms did not remain part of the law of the land after he passed away, those with which the name of Napoleon is for ever connected form the beginning of a new epoch in French legal history, and have, in form at any rate, influenced the legal systems of a great part of Europe.

A fair consideration, therefore, of the law reforms of

<sup>(</sup>b) Cromwell's Letters and Speeches, Vol. IV. p. 209.

the Commonwealth must lead to the conclusion that Cromwell made an honest endeavour to improve a part of the national system essential to the welfare of the people. His position in this respect was not a little difficult. By urging reforms in the law he would obviously gain the goodwill of the people in general and of the army in particular; but by so doing he would with equal certainty incur the dislike and the opposition of the lawyers, who could put many difficulties in his path, and whose support both for personal and dynastic reasons it was his interest to gain. That Cromwell's own sympathies were in favour of vigorous law reform his whole career goes to prove, and it is eminently a proof of the broad and statesmanlike views which he took of things that until the very end of his career the Protector was urging on the Legislature the necessity of introducing changes in the law which should be comprehensive and thorough, but not destructive of its fabric.

But, apart from Cromwell's personal attitude to law reform, we cannot fail to see how in this period there stands out with clearness the effect upon the law of strong political and social movements; while equally apparent is the vigorous common sense of the English people, who were sincerely anxious to improve their legal system, but with the exception of a few extreme men were wholly averse to revolutionary projects. We see the lawyers as a body opposing, as they have so often done in modern times, all changes in the slightest degree likely in their estimation to lessen their influence or their incomes. We are struck, too, with the fact that, considering how favourable were the times for reforms, yet—making all due allowance for

the really substantial measures which became law—the projects actually executed were comparatively few. But, regarding this epoch in all these aspects, it yet remains one of the most noticeable in the history of English law; and a study of the legal events which mark it is necessary for the full appreciation of the history of the Commonwealth.

## CHAPTER IV.

## THE GENESIS OF THE HIGH COURT OF ADMIRALTY.

It is now well recognized that in studying the history of a nation, its legal system and the relations of the body of law to the people are of the first importance. For it is the law by which the daily conduct of a people not wholly barbarous is governed, and we must examine it if we would fully understand the ideas and the feelings of an age. Thus the history of the maritime courts and of the maritime jurisprudence of England reveals pictures of its social and political past, and introduces us to unexpected sources of law and procedure. Moreover, the early history of English maritime law has an interest beyond the boundaries of the British empire, for the beginnings of it are equally the beginnings of the maritime law of the United States. These points stand out prominently when we come to examine the genesis of the High Court of Admiralty, and of its jurisdiction during the growth of the English people. That court has been, since 1873, merged in the Supreme Court of Judicature; it now oddly enough as it seems, forms a part of the Probate, Divorce, and Admiralty Division (a), but of

<sup>(</sup>a) The cause of the incorporation of two totally different Courts in one Division was that neither the Admiralty nor the Probate Courts were Common Law or Chancery Courts. They were Courts which sat at one time at Doctors' Commons, and the practitioners in them were at one

necessity there exists under this guise of nominal consolidation a practical separation which is inevitable, since there can never be a real consolidation of tribunals without a community of interests, and this does not exist by reason of the differences of the subject-matter of the jurisdiction of this Division.

But we are concerned now, not with this comparatively recent transformation of a tribunal which existed in a separate form for many centuries and still exercises important functions and is almost international in its character, but with its beginning and with its early growth.

It is obvious that there cannot be a Court of an Admiral unless such an officer exists, and such an appointment indicates a systematic, though it may be a rough and ready management of the naval affairs of a nation. In the first place, therefore, we should know something definite in regard to the creation of the office of Lord High Admiral, and of the duties with which he was entrusted, since in them are to be found the germs of a later maritime jurisdiction.

Of the origin of the High Court of Admiralty we are now much better informed since the publication by the Selden Society of the two volumes known as Select Pleas in the Court of Admiralty (b). The Introduction to them

time also civilians, as distinguished from practitioners in the Common Law and Chancery Courts.

<sup>(</sup>b) Select Pleas in the Court of Admiralty. Edited for the Selden Society by Reginald G. Marsden. 2 vols.

is so lucid and simple that it has a tendency to minimize, the amount of valuable and careful research which was bestowed on this work by the editor.

From the Introduction and from the body of this work it is possible to obtain some interesting light on the beginning of the High Court of Admiralty. The following pages will be chiefly confined to one subject, namely, the paramount influence which mediæval piracy had on the creation of what at first was a rude and unsystematic jurisdiction. To professional lawyers it matters not at all how a particular jurisdiction or court came into existence; indeed, we are all too ready to forget that the history of a nation can never be properly understood without a clear perception of the connection between political and social movements and the growth of the law. But before we consider in detail the subject of piracy in the early ages of England, we must for a moment refer to the word "admiral."

The term "admiral" was first used in England in the fourteenth century: in 1300 one Gervase Alard is called "Admiral of the Fleet of the Cinque Ports." That may be considered, at present at any rate, as the first English use of the word, though it occurs at an earlier period in connection with the French possessions of the English kings. In a Vascon Roll of Edward I., in 1295, "Berardo de Sestars (or de Sestas) is appointed Admiral of the Baion fleet—'Admirallum maritime Baion et capitaneum nautarum et marinariorum nostrorum in ejusdem villa.'" The following year De Sestas is again mentioned with the same title, whilst in another Vascon Roll of the same

year, William de Leyburn and John de Butetort are described as "Amiraux de nostre navire D'engleterre."

Mr. Marsden is therefore obviously right when he says that "the word 'admiral' came by way of Gascony to England," but whether it came in the first place from the east or from Genoa, as he suggests, does not seem so clear. It is sufficient for English historical purposes that we find at the beginning of the fourteenth century a maritime leader who bears the title and, as such, is the deputy of the king and is the captain and judge of the fleet.

The question, however, suggests itself, Why should the leader of a naval squadron be the judge of matters which concern private individuals? why should he exercise functions wholly different from those of a naval commander responsible only for the discipline and conduct of his fleet?

We have grown so accustomed to the fact that the High Court of Admiralty was originally the Court of the Lord High Admiral of England, that one feels almost surprised when such a question suggests itself. But a moment's reflection will show that without some sound historical explanation it is not easy to answer it satisfactorily. The admiral of a fleet is not a lawyer—he is a naval commander; he is not to be found in one place; on the contrary, his duties would naturally take him to sea. He is not, for example, as was the Lord Warden of the Cinque Ports, a high local official within his jurisdiction supreme, who would give judgment upon every matter on which he could lay his hands, criminal or civil, maritime or muni-

cipal. Judicial fictions, which have so often taken the place of historical knowledge, will not give the required explanation; we must seek for it in facts.

At present, however, we are a long way from anything in the nature of a regular court of law, or even from a jurisdiction other than one merely disciplinary over the sailors of the fleet; it is in the first instance therefore necessary to understand to some extent the state of affairs on the seas around England in the fourteenth century.

The burning question of the day was that of piracy: the seamen of England preyed upon the ships of France, and the seamen of France seized the merchandise and the ships of Englishmen. The business was of the simplest kind: a ship which was larger than another could seize it and carry off spoil, or a ship in distress could be boarded and robbed. Nor were the so-called pirates particular about nationalities, and Englishmen were not above taking advantage of the distress of their own countrymen, or of their continental allies.

We must not, however, be led away by the popular modern idea of the word "piracy"; we must not imagine an organized body of men, exceptions to the mass of ordinary citizens, sailing in a particular ship with their hand against every man and every man's hand against them. What we see is, in truth, society in an elementary state, in a particular region of the world; that is to say, law had not yet extended from the land to the sea: the idea of property, of anything in the nature of international comity, stopped at the seashore, and the right

to property on the seas was vested in the strong man. Throughout the latter half of the thirteenth and the first half of the fourteenth century, there is conspicuously visible a struggle between barbarism and civilization on the seas, a conflict between lawlessness and law, and attempts, weak and ineffectual but constant, to protect private property on the ocean.

These attempts were various. In some instances the sovereign, at the request of private and injured persons, himself intervened, in which case the question was referred to the chancellor, or to the judges, or the king was the actual judge. Thus, in 1294, "a case of spoil was tried 'coram ipso domino rege-coram domino rege et concilio suo'''(c). In other instances, the ordinary tribunals of the country were invoked for the purpose of bringing justice to bear on those who had seized property at sea. "The Assize and Coram Rege Rolls furnish many instances of trials, both criminal and · civil, of pirates and spoilers, according to the common law. . . . Sometimes the whole matter was disposed of by the chancellor, and sometimes issues as to piracy or no piracy, and as to the ownership of property and ships spoiled, were directed out of chancery to the King's Bench, or to commissioners of Oyer and Terminer. Such issues, returnable into Chancery, were tried by juries taken from the county in which the spoil was committed, or from the county to which the spoiled property was brought or the spoilers came, and the juries were sometimes of good and lawful men and sometimes merchants

and mariners. The Commissioners directed the trial to be either 'secundum legem et consuetudinem regni Angliæ,' or 'secundum legem mercatoriam' or 'maritimam.' The granting of letters of reprisal and marque was also within the jurisdiction of the chancellor" (d).

It is clear, however, that while appeals, whether to the King or the chancellor, bore witness to the existence of a legal system, however slight, the practical strength of the law was unworthy of notice. Throughout the first half of the fourteenth century piracy flourished, and the law when it was invoked was, in most cases, powerless. An instance of this may be seen from an occurrence in the year 1339. Some Englishmen had committed piracy on goods belonging to Spanish, Portuguese, and Catalan merchants in Southampton Water. We can only surmise that the goods of these merchants were there in vessels ready to be landed. A commission was, at any rate, issued to three gentlemen, probably of the locality, to inquire into the matter, commanding them to seize the spoiled goods and restore them to their owners. names of the spoilers were ascertained with the goods that had come into their hands. But the record relates that as to the pirates there was a return of "non sunt inventi," and, adds the editor, with some grim humour, "it does not appear that the plaintiff received anything." The king, the chancellor, the judges, and every one else, were, in fact, powerless. It was impossible, in other words, for legal sentences to be enforced at sea. Piratical persons, however well known, had only to go to sea to escape from legal punishment.

Side by side with the demands of private individuals for redress we find important public and, as they may be called in modern phraseology, diplomatic expostulations. There was nothing to choose, however, between the French and English pirates, and the complaints of the sovereigns of the two countries were mutual. "In 1321, and again in 1323, Edward II. complains to the King of France of the capture of an English ship by one Berengarius Blanchus, guardian or admiral of certain ships-'custos seu admirallus quarundam navium' of Louis, late King of France, and of the denial of justice by France" (e). Against this complaint may be set a complaint by the King of Arragon in 1324. It is the more noticeable since it shows us the perfect willingness of Edward II. to give redress and, at the same time, a certain respect for law in England, which may, perhaps, have been an actual difficulty in the way of the prevention of piracy. "Edward II., in answer to complaints made by the King of Arragon of delay in obtaining justice in the matter of piracy, says that the merchant who was spoiled, one Peter Jacobus, had failed to give the names of the spoilers, and that although he has appointed justices to try the case, it is still undecided by reason of difficulties which have intervened, and that the law of England does not allow any one to be condemned for a crime unless he is convicted of it. He refused to adopt the practice of Spain, which was that reprisals by way:

of arrest were granted upon proof in the Spanish courts of the spoil complained of "(f). In some instances, however, the spoiled merchant obtained more solid satisfaction, since from time to time the English sovereign appears to have paid for losses out of his own purse. "In 1350 he had paid £152 to the Bardi for the spoil of a cargo of wool in a ship sailing from Southampton to Flanders; and in 1336 he had compromised another claim of Genoese merchants by a like payment out of, grace" (g).

Piracy, in fact, in the middle of the fourteenth century was one of the most important questions of the time; it affected merchants and shipowners of every maritime country; it was a constant cause of annoyance and of expense to the sovereign himself. An increase of civilization and of wealth in England and the Low Countries, in France, and on the shores of the Bay of Biscay, only made the impotence of the law on the high seas more keenly felt. Without commerce there is no prey for pirates, and the increasing outcry for a stronger maritime law shows how important had become the commercial trans-marine intercourse of England and Europe. And we have yet another illustration of the manner in which the growth of law is influenced by and reflects the progress of the people.

A marked change, however, occurs in the middle of the fourteenth century, another instance of the influence of

<sup>(</sup>f) Vol. I. p. 25.

<sup>(</sup>g) Vol. I. p. 28.

sea power on history. In 1340 was fought the battle of Sluys, a factor as determining as the Nile or Trafalgar. It made the English monarch for the time being sovereign of the narrow seas, king not only of England, "Touz les pays tenoient et appelbut also of the sea. loient nostre avan dit seigneur le Roi de la mier," such are the terms of a petition to Parliament in 1372, when Crecy and Poitiers had followed the sea victory of Sluys. It reduced to reality a shadowy claim which the kings of England had from time to time put forward. The power and the prestige of the English sovereign now gave him the right and the means of enforcing some kind of law But the legal jurisdiction of the admiral on the sea. did not spring up fully armed immediately after the battle of Sluys; some years of further growth were necessary. We see it uprising in 1342, when we find that to Robert de Morley, admiral of the northern fleet, and to two others had been assigned the duty of making inquisition by the oaths of jurors from the county within the jurisdiction of the admiral concerning the spoil of a ship of Flanders called the Tarryt. The spoilers were tried before the justices. But five of them were pardoned "upon their producing the certificate of the admiral that they had equipped ships and gone to serve the King in his expedition to Brittany." The power of the admiral was thus distinctly recognised, though the actual trial was before justices. Other instances might be given of the growth of the admiral's jurisdiction for the twenty years after the battle of the Sluys.

At length, in 1360, John Pavely is appointed "capitaneus et ductor" of the fleet, with disciplinary powers

as had been not uncommon, but, for the first time, he is given a legal jurisdiction, the patent—as translated from its Latin meaning-"giving to him full power by the tenor of these presents of hearing plaints of all and singular the matters that touch the office of the admiral and of taking cognizance of maritime causes and of doing justice and of correcting and punishing offences and of imprisoning and of setting at liberty prisoners . . . and of doing all other things that appertain to the office of admiral as they ought to be done of right and according to the maritime law" (h). Here we have the first distinct and clear grant of a maritime jurisdiction to the admiral. It was a recognition by the Crown of a jurisdiction which, in a tentative and uncertain manner, had been already asserted from time to time by the admirals of the north, west, and east, a jurisdiction which was so indefinite that it cannot be regarded as a legal fact, and which had not been admitted by the King's Courts. Thus in the year 1296, in an action in the Common Pleas, objection was taken to the jurisdiction by the counsel for the defendant on the ground that there is assigned on behalf of the king upon the sea an admiral to hear and determine (over and terminer) complaints of matters done on the sea. Court, however, denied that it had any knowledge of the admiral's legal power. Points such as these indicate some kind of readiness in the admiral to decide disputes, but he was in fact more of an arbitrator in such instances than a judicial officer. The appointment of Pavely was followed a few months later by the entrusting of the command of the three fleets of the north, south, and west to one admiral, Sir John de Beauchamp, who "was succeeded in 1361 by Sir Robert Hearle, also admiral of all the fleets." Each of the patents of those two admirals "contains, in addition to the usual disciplinary powers, a grant of maritime jurisdiction secundum legem maritimam" (i).

In these two patents is also found for the first time a power for the admiral to appoint a deputy, and other patents from this date to the end of the century are in the same terms.

There is, therefore, clearly visible in these last sixty years of the fourteenth century a group of interesting and suggestive facts,—the supremacy for the time being of the English sovereign on the seas, the appointment of a single high official, an admiral of the English fleet, to whom is granted not only the ordinary disciplinary powers of a naval commander, but the jurisdiction of a judge of maritime matters. As a necessary consequence, he had the right to appoint a deputy, which would, probably, be a lawyer, and whose sittings constituted a court of admiralty which was primarily intended to check piracy. It was not, however, until the year 1482 that there is clear evidence of the appointment of a judge, for the patent of William Lacy, the first which is extant, is dated in that Thenceforward follow a succession of regularlyappointed judges, showing that the Court of Admiralty had become a recognised municipal tribunal, although it was one regarded with no little jealousy by the other courts of the realm.

From 1360 to the year 1536, cases of piracy, both

criminal and civil, were usually tried in the Admiral's Court with or without a jury. But piracy flourished in spite of it, and continued to do so throughout the fifteenth century. Excellent illustrations of French piracy are given in a paper by M. Alfred Spont in the Revue des Questions Historiques (April 1, 1894), entitled "La Marine Française sous le règne de Charles VIII." "Nos corsaires poursuivent indifferement Anglais, Espagnols, Portugais, ou Italiens." It is not necessary to give more than two of the instances stated by M. Spont: "Deux navires Français sont arrêtés à Sandwich, et par represailles, le Maréchal d'Esquerdès fait emprisonner quelques Anglais. Hesdin. (Mai 1483.)" Again, in 1484: "Jean Darrompel, seigneur du Lac, Capitaine de la Marie d'Ecosse, est pillé par les Anglais et reçoit 600 livres de récompense sur le domaine de Normandie (21 Août)."

This state of things was not surprising, since the prevention and punishment of lawlessness on the high seas is rather a matter of police than of jurisdiction. It was all very well to establish an Admiral's Court, but such a tribunal could not alter the habits of the people, nor destroy the sympathy of the coast men for those of their number who had taken a prize. It was easier to get a judgment against a so-called pirate than it was to find the man himself to punish him, and it was not difficult for those whose duty it was to bring a pirate to justice to fail to obtain the evidence necessary to ensure his conviction. The failure of the Admiralty Court for the main purpose for which it was created became so obvious in the beginning of the sixteenth century that Henry VIII. concluded a treaty with Louis XII. in 1509, and with

Francis I. in 1518, by which it was agreed that both in England and in France special tribunals should be established for the trial of pirates. Something very much like martial law was to be administered. For the procedure was to be speedy and informal, "summaric et de plano sine strepitu et figurâ judicii . . . sola facti veritate inspecta."

So things went on until 1536, when the criminal jurisdiction of the Admiralty Court over piracy was handed over to the common law courts (j) for the reason as the statute recites, and this should be carefully noted, that pirates, thieves, robbers, and murderers on the seas, escape unpunished.

It is easy to understand the position of affairs when we read a document which is printed in the first volume of the Select Pleas of the Court of Admiralty (k). It bears the simple heading of "Re Shenew," and it is stated to be a petition to the admiral of a French ship by Englishmen; the petition being subsequently referred to the judge of the Admiralty Court. It gives us a quaint and lifelike picture of maritime and commercial life and of the comparative impotency of the arm of the law.

"In the most humble wise piteously complaining," it begins, Piers Shenew of St. Malo in a time of peace together with two other merchants of St. Malo sailed from Bordeaux in the *Mary of St. Malo*, of 28 tons, with a cargo of wine, for Ireland. Here they sold the wine and

<sup>(</sup>j) 28 Hen. 8, c. 15.

<sup>(</sup>k) Page 73.

bought salt, hides, and herrings, and having loaded their ship in Carlingford, they made sail for their own country. Contrary winds drove them to an anchor in the haven of Skerys. There, on the 6th of February, Walter Soly, an Englishman, and many sailors in a great ship with two tops came with staves and swords, carried the sailors off to his own ship, and kept them for ten days below deck. Then he landed them on the Isle of Man, and left them there robbed and spoiled of the ship and her cargo to their utter undoing. The matter was referred—as we have said -to the Judge of the Admiralty Court, so that proceedings should be taken against this turbulent Englishman. But how the suit ended we know not; probably the Frenchman had to put up with the loss of his ship and of his goods. But the facts of the case, stated nakedly in a legal document, show how intolerable was the existing state of affairs on the seas. The growing commerce of England, which was contemporary with the increasing prosperity of the English towns and seaports, was hampered by lawlessness on the seas just as was that of the towns of Flanders and of France.

But though the Admiralty Court failed in what was its most important object, it had yet obtained by the end of the sixtcenth century jurisdiction as a municipal maritime tribunal. Here was a tribunal in touch with seamen and the business of the sea, and so, with the practical sagacity which has always characterised Englishmen, the Admiral's Court became a court for the decision of purely maritime disputes. Some seaport towns had "port" or marine courts, in which local mercantile disputes could be tried, but, where these were not to be found, no special

tribunal was available but the court of the admiral. That a conflict should arise between local jurisdictions, such, for instance, as that of Yarmouth, and the admiral's jurisdiction is not surprising, nor as regards purely maritime causes is it surprising that the latter jurisdiction should ultimately prevail. Neither the admiral nor his deputy ever forgot that it is the business of a good judge to enlarge his jurisdiction, and however jealous the common law courts might be of the Admiral's Court, suitors must have found it convenient. But to discuss the conflicts which continued for so many years between the Admiralty Court and the other High Courts of the kingdom would take us outside the particular scope of this chapter.

Fixity and certainty of jurisdiction is altogether inconsistent with the growth of a tribunal or with the development of society. It is only after civilization has come to a particular point that the law courts of a nation can be regarded as having settled functions, and the early history of the Admiralty Court is noticeable for periodical fluc-Limitations placed on the Court, and never very strictly enforced, were relaxed by Henry VIII., and thus, with the jurisdiction at one period expanding, at another contracting, it has gradually attained a distinct and limited, but well recognised, maritime jurisdiction.

With the later part of the history of the High Court of Admiralty we are not now concerned. The object of this chapter is to emphasise the historical point which stands out so prominently in the Select Pleas of the Court of Admiralty that the extent of piracy in the Middle Ages was in a great degree the cause of the genesis of the ď.,

Court of the Lord High Admiral. "The origin of the Admiralty Court can be traced with tolerable certainty to the period between the years 1340 and 1357. instituted in consequence of the difficulty which had been experienced in dealing with piracy or 'spoil' claims made by and against foreign sovereigns." This is a concise summary of the evidence which has now at length placed this portion of our legal history on a sound historical footing, and removed it from that region of uncertainty in which, from an absence of detailed research, so many of our legal institutions have remained. But we should hesitate to adopt the above conclusion without qualification. For as already pointed out, the Lord High Admiral seems from time to time to have acted as a judge in criminal and civil matters in the thirteenth century. The truer view is that the subject of piracy in relation to the Admiralty Court is of great importance, because by reason of its being an international question, it caused this court to be sanctioned and protected in order to be of use for a particular purpose. Without this protection it is possible that the admiral's jurisdiction would have languished and expired, or have been crushed by the opposition of other courts. The legislation in the reign of Richard II. (1), though intended to limit the jurisdiction of the Admiral's Court to things done upon the sea, was an express recognition of a special jurisdiction, and though the admiral and his deputies did not acquiesce in this limitation, it was in fact a very efficient safeguard of a jurisdiction which had come into being in a haphazard and unusual manner.

<sup>(</sup>l) 13 Ric. 2, st. 1, c. 5; 15 Ric. 2, c. 3.

## CHAPTER V.

## SOME SOURCES OF ENGLISH MARITIME LAW.

THERE is a natural tendency among those who are concerned with the administration of the law to criticise its results and its form, and to trouble little about its sources. This is especially the case with maritime law, which now consists largely of decisions on the construction of mercantile documents, and on the interpretation of commercial customs. Amidst this structure of case law primary principles are almost lost. It is to some—and to an important extent-among early European collections of sea law, that we must look for some foundations of English maritime law, collections also which bring before us vividly illustrations of mercantile and maritime life in the Middle Ages. Of these collections of enactments, decisions, and customs, the most ancient is the Rhodian Sea Law (a), which connects mediæval times with Byzantine jurisprudence. For centuries the socalled Rhodian Sea Law has formed a groundwork for learned commentators and for erudite scholastic criticism. According to the best authorities it appears that the portion containing forty-seven chapters is the most ancient and most authentic part, and was "probably enacted by one of the Isaurian Emperors Leo or Constan-

<sup>(</sup>a) For information on the Rhodian Sea Law the reader is referred to Mr. Walter Ashburner's learned and exhaustive work, The Rhodian Sea Law. Oxford, at the Clarendon Press, 1909.

tine Copronymus." Further, this code has no connection with Rhodes, and was only given the title it bears in order to add weight to its authority. The portion which has been often called Part II. is somewhat in the nature of an appendix, probably compiled at the same time as the forty-seven chapters, and was placed in this form because it was concerned with matters of small importance. so-called Prologue appears to be of much later date than the two other parts—when and by whom it was compiled is a matter of complete uncertainty, and it has even been suggested that it was "an exercise composed in the law school which was established at Constantinople in the middle of the eleventh century" (b). Speaking broadly, the essential part of the Rhodian Sea Law regulates the relations of the owner, the master, and the merchant who is freighter of a vessel, as well as the conduct of the It is somewhat surprising that a code which is concerned with maritime business at a time when commerce on the seas was in a very primitive and simple condition, should have been regarded with so much respect in England even as late as the end of the eighteenth century. For the Rhodian Sea Law appears now to be more interesting as a legal relic than as a chapter of ancient jurisprudence which can affect modern law.

In mediæval times, the two bodies of sea laws which deserve the closest attention are the Judgments of the Sea or the Laws of Oleron, on which the Laws of Wisbuy and the Purple Book of Bruges are substantially founded, and the Customs, which are part of the Consulate of the

<sup>(</sup>b) The Rhodian Sea Law (Ashburner), p. 74.

Though these codes are foremost in interest, there are other collections of maritime rules which cannot be ignored, such as the so-called Amalphitan Table or the Ordinances of the City of Amalphi, as well as the Ordinances of Trani, and the several statutes of Pisa, Venice, and other southern maritime towns. In these collections is certainly to be found the source of much of English maritime law. Nothing is more noticeable than the comparatively advanced state of development both in matter, and in form of maritime law on the Continent when it was exceedingly meagre in this country. It follows almost as a matter of course that commercial intercommunication would cause maritime rules which definitely existed in one city or country to have an influence on the law of another, which was merely in process of formation and which was never embodied in anything like a code. It is true, indeed, that to some extent maritime law, from the nature of its subject-matter, is more alike in all countries than any other branch of municipal law, and is less affected by national customs and habits of thought. But it does not therefore follow that where the maritime law of one country is formulated, it will not be imported from that country to one in which jurisprudence is in a less precise state and where principles have not been definitely fixed.

The Judgments and the Consulate of the Sea are, as already indicated, the most interesting of the mediæval collections, and are the most representative codes of the merchants and mariners of Northern and Southern Europe in the Middle Ages. They were not merely codes accepted in one or two places but had a general application

in the ports of the North Sea and on the shores of the Mediterranean. From the little island of Oleron on the Western Coast of France came, it is supposed, the Judgments of the Sea: obscure as their origin is, we can scarcely be surprised to find that the date and place of their promulgation has caused lively and learned disputes among legal writers on the Continent. Even the judicial Hallam ventured to aver with some emphasis that the Judgments of the Sea "were a set of regulations chiefly formed from the Continent, and they have been denominated the laws of Oleron from an idle story that they were enacted by Richard I. while his expedition to the Holy Land lay at anchor in that island." But though, as Sir Travers Twiss in his introduction to the several volumes of the Black Book of the Admiralty has shown, it is impossible to fix with certainty any particular year as that in which either of these codes were formulated, it may be assumed with some reason that the Judgments of the Sea must have been promulgated towards the end of the twelfth, and the Consulate about the end of the fourteenth century. Neither can there be much doubt that the Judgments of the Sea had their origin as a distinct code at Oleron, in those days a port of some importance. The story of their enactment by Richard I. may rest, perhaps, on some basis of fact, and it is possible at any rate that they received the official approval, if it may be so called, of that monarch. The island and seaport of Oleron passed into the possession of the British Crown on the marriage of Eleanor, daughter and heiress of William Duke of Guienne, with Henry II. of England. Long before these Judgments were drawn up, a floating, yet to some extent a regular body of law

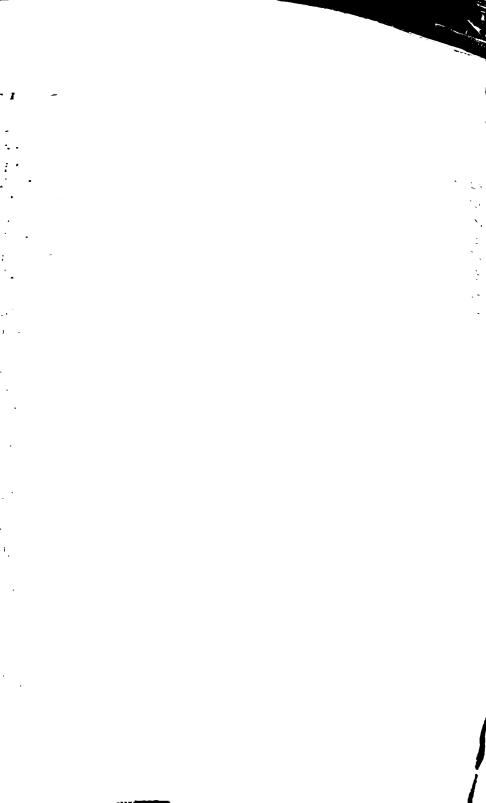
must have been in existence; for judgments such as these in an age such as the twelfth century would not have been thrown into a somewhat symmetrical form until the principles enshrined in them had been generally accepted and acted on. If these judgments had not been long in existence in the form of a code at the time of Richard's stay at Oleron, it would not be improbable that he should be asked to approve of them.

Coming to a later period, two circumstances in the reign of Edward III. point to the authority of the Laws of Oleron, and to the influence of the early maritime law of the Continent on that of England. In an inquisition taken at Queenborough by command of Edward III. on April 2nd, 1375, before the Admiral of the King and a jury, it is stated in regard to a question of pilotage that "the aforesaid jurats do say it seemed to them in that case that they know no better advice or remedy, but that it be from this time used or done in the manner which is contained in the law of Oleron." In the same way and for the same purpose these laws are further alluded to in this same inquisition, showing that when doubts existed the Laws of Oleron were referred to as containing the guiding rule of maritime conduct. There is also an important allusion to the Judgments of the Sea in a case cited in Prynne's Animadversions (c), and tried in the twenty-fourth year of the reign of Edward III. It was an action in the Mayor's Court of Bristol, and was brought against the master of the ship La Graciane, of Bayonne, for damages done to the plaintiff by a servant

The actual cause of action is not that of the master. which is noteworthy; the remarkable fact in the case is that both the plaintiff and defendant appealed, so to say, to the Laws of Oleron, with the result that judgment was given for the plaintiff, who had argued that the defendant was liable "quod secundem legem et consuetudinem de Oleron, unisquisque Magister navis tenetur respondere de quâcunque transgressione per servientes suos incadem Both these instances are remarkable because the precedents referred to in these cases are not to be found in the twenty-four articles of the Laws of Oleron as they seem at first to have been drawn up. They are part of the subsequent ten articles which in the English MSS. are classed together with the first twenty-four as the Laws of Oleron. The origin of these ten additional articles is uncertain, but their very addition to the earlier articles shows the authority which attached to the original Laws of Oleron. For their classification under the title of Laws of Oleron was clearly intended to add to their weight, and to give them a value and an importance which in themselves they possibly might not possess. At the same time, this addition to the original articles shows how easily subject-matter of laws may be in reality wrongly named, and its origin misunderstood. The citation of the Laws of Oleron, additional articles and all. in two instances is, however, clear evidence to show the sources to which in the fourteenth century Englishmen who were concerned with maritime law were wont to turn for guidance.

The noticeable feature in the Judgments of the Sea as they have come down to us, and indeed of all the collections which have been preserved, including the Rhodian Sea Law, is their inartistic but practical form. No attempt is made to arrange the subject-matter in consecutive order, and the internal evidence is strong to show that they are neither more nor less than is implied by their name—judgments on certain points of maritime law, which arose from time to time, and which as they occurred have been adjudicated upon by the prudhommes of Oleron. No theoretical subjects which had not been raised in actual maritime affairs are touched on, so that these twenty-four fragmentary articles are very far from being in any way a complete and harmonious code of maritime jurisprudence. Thus we see here in its barest form the creation of law by judicial decisions sealed as it were by the force of custom.

On the other hand, the Customs of the Sea are more important, because a fuller and more complete work. These, say the compilers (we quote from Sir Travers Twiss' translation of the Catalan version known as "MS. Espagnol 56" in the Bibliothèque Nationale in Paris), "are the good constitutions and good customs which regard matters of the sea which wise men who travelled over the world composed therewith books of the science of good customs." They form a part only of the Consulate of the Sea, which was compiled, it would seem, for the use of the Consular Court at Barcelona. The commencement already quoted cannot be considered as doing more than indicating very vaguely that it was partly composed of customs reduced into writing, especially as it does not appear in all the extant MSS. The Consulate, it is more likely, was collected from



in those times answered to the forfeiture of his bond to pilotage authorities, which is about the worst fate which can nowadays befall an incompetent pilot.

Writers on jurisprudence have had less influence in Engiand on the substance and the form of municipal law than in other European countries, but it is important to note that in the introduction to the first edition of his famous work on the Law of Merchant Ships and Seamen (1802), Lord Tenterden writes: "The Ordinances most frequently quoted are those of Oleron and Wisbuy, the two Ordinances of the Hanse Towns, and the Ordonnance de la Marine du Mois d'Aoust, 1681. The Ordinances of Oleron and Wisbuy and the first Hanseatic Ordinance are in the hands of every lawyer; and whenever the Hanseatic Ordinance is mentioned generally, the reader will understand this to be spoken of. The Hanseatic Ordinance of the year 1614 was published with a Latin translation and commentary by Kuricke in a small quarto, at Hamburg, in the year 1677." The value placed on the mediæval codes in Lord Tenterden's time is well illustrated by his remark that the Ordinances of Oleron and Wisbuy "are in the hands of every lawyer." To-day (1911) it is probable that not a single English or American practitioner possesses them or would ever refer to them But the importance of Lord if he owned them. Tenterden's reference to the mediæval collections of sea laws in his classical work on the Law of Merchant Ships lies in the fact that he eventually became Lord Chief Justice, and that in this capacity he was able to give practical effect to rules which, though they might be approved by him as a text-writer and influence his opinion

as a mere jurist, carried in the pages of his book no weight as legal precedents. But after he had reached the Bench, the words which he wrote obtained an exceptional authority, and in this way could affect the judgment of those who succeeded him as judges. This statement is well illustrated by Lord Tenterden's dictum in his book that where a ship has met with a disaster the master is at liberty to procure another ship to transport the cargo to its destination, but if his ship can be repaired he is not bound to send the cargo forward in another ship. His action must depend on the circumstances of the case. This statement of the law accords with that of the Rhodian law (d), the Laws of Oleron, and the Law of Wisbuy, and is opposed to that of the old French ordinance, which makes the duty of the master to tranship obligatory. This rule as to liberty to tranship, as stated by Lord Tenterden, was approved by the Court of Queen's Bench in 1838 (e), and we may, therefore, fairly say that on this point the connection between the mediæval codes and modern English law is reasonably traceable.

Some of the judgments of Lord Mansfield, again, show how much the jurists of modern times relied for guidance on the mediæval sea laws of the Continent. This eminent judge must be regarded as one of the first founders of maritime law in this country, and the debt which he owed to the mediæval codes is visible in a decision which laid down the rules which govern the right to freight pro ratâ itineris. The rule of English law is that

<sup>(</sup>d) The Rhodian Sea Law (Ashburner), Chap. XLII. p. 116.

<sup>(</sup>e) Shipton v. Thornton, 9 Adolphus & Ellis, 314.

if the voyage is not completed, the shipowner is not entitled to freight for goods delivered at some point short of the agreed destination. If, however, the voyage comes to an end through some peril of the sea at an intermediate port the shipowner is bound to carry on the goods in his own vessel when she has been repaired, or to tranship them to another craft for this purpose, if he desires to obtain the original stipulated freight. But, on the other hand, if the owner of the cargo accepts it at this intermediate port, it is said that the law of England implies a contract to pay a freight in proportion to the length of the voyage which has been actually performed. In 1738, the House of Lords gave judgment to the effect that full freight was due on goods carried only to an intermediate port when the shipowner was willing to carry them to their destination. In 1759, however, the first fully reasoned decision which can be said to exist in the reports was delivered by Lord Mansfield in the case of Luke v. Lyde (f), which laid down the law as has been stated. This decision has long been a household word in connection with maritime law. That the main ground of it was found in the maritime law as formulated in the Rhodian Sea Law, the Judgments of the Sea, and in the Consulate of the Sea, is apparent on the face of the judgment itself. That there were all the necessary elements present on which to base the fiction of an implied contract is equally clear. It is certain that this judgment formed the foundation for the subsequent superstructure of case law on this subject, in which the liability to pay freight pro rata is treated as being based on the doctrine of an implied contract. But

<sup>(</sup>f) 2 Burrows, 882 (1759).

however convenient this fiction may be, it is impossible to doubt that the true origin of the cargo owner's liability is the equitable right, or, more popularly speaking, the just claim of the shipowner, to receive payment for the partial carriage of the goods, for the work which his ship and sailors have done for the cargo owner, who by accepting his goods at a particular spot short of their original destination has received a service from the shipowner for which he is in justice bound to remunerate him. It may be well to give an instance of the judicial use of this convenient and frequently used fiction. In the case of Mitchell v. Darthey (q), Chief Justice Tindal spoke these plain words: "The claims of the shipowner must therefore rest upon an implied contract to remunerate him for services performed not according to the agreement, but a service from which the freighters have received a benefit." Let us contrast this right so based, with the words of the Fourth Article of the Judgments of the Sea, as they appear in the translation by Sir Travers Twiss in the Rolls Series of the Black Book of the Admiralty (h): "A ship departs from Bordeaux or elsewhere; it happens sometimes that she is lost, and they save all that they can of the wines and other goods. They may well have them paying their freight for such part of the voyage as the ship has made if it pleases the master. And if the master wishes, he may properly repair his ship, if she is in a state to be speedily repaired; and if not he may hire another ship to complete the voyage, and the master shall have his freight for as much of the cargo as has been saved in any manner. And this is the judgment in the case."

<sup>(</sup>g) 2 Bingham N. C. 555.

<sup>(</sup>h) Vol. III. p. 8.

Neither in this passage, nor in the authorities cited by Lord Mansfield in support of his judgment in Luke v. Lyde, is there a single indication of the doctrine of implied contract; it is treated as a simple right arising from work done for another, and the judgment itself is rather based on mediæval expressions of maritime law and custom than worked out from first principles.

If we turn to another branch of jurisprudence, that which is administered in the Admiralty Court, we shall find that in the leading case of The Gratitudine (i), which was decided by Lord Stowell in 1801, and settled the right of the master of a ship to hypothecate cargo for the cost of the repair of a ship when in distress, the mediæval codes of the Continent were cited in the arguments of counsel, and referred to in the judgment as fortifying the opinion of the Court so far as it rested on broad principles. The Consolato del Mare, the Laws of Wisbuy, and the Ordinance of Antwerp were all relied on; "the passage," said Lord Stowell, "which has been cited from the Consolato, Art. 104, is applicable. There it is said that a merchant, being on board with his goods (which was the custom according to the simplicity of ancient commerce), having money, was obliged to advance it for the necessities of the voyage; and if he had not money, the master might sell a part of his lading. The Ordinance of Antwerp, likewise, seems expressly to recog-It may be said that these ancient authorities were only used to show the propriety of the general principle enunciated by the Court, and not being judicial precedents cannot be regarded as forming a basis for the

decision. Whilst no doubt this is so, a part of an ancient collection which starts as it were a principle, has by the mere fact of thus stating it made it available as an influence on the mind of the Court. When, as in England, judicial decisions only are regarded as actual precedents to be followed, it is not easy to know the exact value which, in the formation of a branch of jurisprudence, should be given to the ancient statements of a principle which is obviously adopted or followed by a Court of a different nationality at a later period of time as happened in the case of *The Gratitudine*.

Again, one of the most fixed principles of law as administered in the High Court of Admiralty was that the seaman had a lien for his wages on the vessel on which he served. This is one of those principles which is said to be based on general maritime law: the seaman was not only to have a remedy against the owner, but a right against the vessel, to use Lord Stowell's words, "as long as a single plank remained." But it is laid down in the 93rd and 94th sections of the Customs of the Sea, that the mariner has a right against the ship if he is not paid by the owner-"if there shall only be preserved a bolt it ought to be employed to pay the wages of the mariner," and "it is incumbent that the mariners should have their wages si la dita nan se n'sabia vendre, even if the ship should have to be sold." Here, then, is to be seen the right of the seaman against the ship; in other words, in the fourteenth century, the seaman's right of a maritime lien is expressly recognised. Even allowing for the obvious justice of such a right the source from which it found its way into the law as administered by the High

Court of Admiralty seems obvious. From this point of view, therefore, the Judgments of the Sea and the Consulate of the Sea have a direct interest in regard to the history of English law, since it is clear that many of the principles of maritime law in this country—the earliest and now the most firmly accepted—were formulated in these and similar collections, and were transplanted from them into the case law of England, often without any open recognition, except now and again, as in the historic judgment in *Luke* v. *Lyde*—a judgment which enabled Lord Mansfield to exhibit his knowledge of general maritime law, in other words, of maritime law as formulated in the mediæval collections of various European countries.

## CHAPTER VI.

LORD STOWELL AS A CREATOR OF MARITIME AND PRIZE LAW.

IF we look back over the years during which English law has been in process of continual growth and seek to ascertain some effects of judicial influence upon it, unquestionably that of Lord Stowell is the most remarkable. He may be regarded as the creator of two different bodies of law-that which is administered in the Admiralty Court, and that which is administered in the Prize Court. It was by a mere fortunate chance that he who was the judge of the High Court of Admiralty became also the judge in time of war of the Prize Court. The genesis of the High Court of Admiralty has been described in some preceding pages of this book (a). The Prize Court, which is the Admiralty Court exercising a peculiar jurisdiction in time of war, has also its source in the disciplinary powers vested in the Lord High Admiral in mediæval times. The growth of jurisdiction is always obscure, and for many years anything in the nature of a prize jurisdiction was of an exceedingly elementary kind. The first case of judicial proceedings to decide the legality of a prize occurs in 1357. "In

that year the King of Portugal complained that an Englishman had spoiled Portuguese goods from a French ship that had previously captured them. The answer of Edward III. is that 'our admiral has judicially and rightly determined the ownership of the goods claimed by your merchants'-i.e. in favour of the captors. This is the first mention that has been found of judicial proceedings before the Admiral; it marks the beginning of the Court of Admiralty as a prize tribunal" (b). 1360 a single Admiral—Sir John Beauchamp—was appointed to command the fleets of the North, South and West, and by his commission he was given, in addition to disciplinary, judicial powers, to be exercised secundum legem maritimam. But prize causes, it would seem, were brought for many years more frequently before the King's Council, or before Commissioners specially appointed, than before the Admiral, and it was not until the sixteenth century that the Admiralty Court became definitely the Prize Court of England. Thus in time the Admiralty Court became possessed of two separate jurisdictions, and the Instance and Prize jurisdictions of the High Court of Admiralty became a distinct feature of English procedure. Lord Stowell presided in the Court of Admiralty when these separate jurisdictions were clearly recognised and in active operation.

How did it come to pass, however, that he left so permanent a mark of his individuality on English maritime law? Several answers may be made to this question.

<sup>(</sup>b) Early Prize Jurisdiction and Prize Law in England. By R. G. Marsden. English Historical Review, Vol. XXIV. p. 680.

Lord Stowell was master of his judgment seat; he had no colleagues to defer to, and every judgment which he delivered was an addition to a number of his own individual judicial opinions. He had the good fortune to occupy his office for a long period, for thirty years (1798-1828) he was judge of the High Court of Admiralty. Before this time no regular reports of the decisions of that tribunal had been collected, and during this particular epoch business flowed into it to an extent unknown to his predecessors. All these circumstances combined to make this period one singularly favourable for the impress of a judicial influence on the comparatively meagre body of English maritime law. There was the hour and there was also the man. Without a judge of unusual ability, especially one possessing remarkable powers of legal exposition, this period of thirty years would not have been so fruitful in the growth of one branch of our law. But Lord Stowell's capacity of clear expression, his mastery of legal principles, his attention to their formulation, arising not a little from his experience as a Professor at Oxford, as well as his great practical sagacity, made his judgments not only the basis of much of modern English maritime law, but also the clearest and most agreeable exposition of it which to this hour is to be found. It is one thing to decide a particular point, it is another to explain the principles on which the decision rests and to apply them to the facts of the case under discussion so that the latter may serve as an illustration of an abstract legal proposition. was this rare gift which Lord Stowell possessed, and it is conspicuous as soon as some of his most remarkable judgments are examined. It would not be easy to find

one which better serves as an example than the decision in 1801, in the case of The Gratitudine (c). The result of that judgment was the creation of the rule of law that the master of a vessel in a foreign port has power to bind the cargo on board by a respondentia bond in order to obtain money to enable the vessel to prosecute her voyage. That rule has never since been questioned, and until steam, the telegraph, and improved postal communication lessened in recent years the necessity for obtaining money on bottomry bonds, it was one of immense commercial importance. The legal power of the master to enter into such a bond depended on his relationship to the owners of the cargo, and therefore, Lord Stowell had, in order to establish a rule upon the point, to consider when, and under what circumstances, the master of a vessel became, by virtue of necessity, the agent for the owners of the cargo. Having established as a legal proposition that in cases "of instant, and unforeseen, and unprovided necessity, the character of an agent is forced upon him, not by the immediate act and appointment of the owner, but of the general policy of the law," and having illustrated the rule by examples, Lord Stowell then applied it to the circumstances under which it may be necessary to borrow money, not only on the security of ship and freight, but also on that of the cargo. Satisfied as to principle, the judge then examined the authorities to see what light might be thrown by them on the subject. These authorities were not only the dicta to be found in English law, but the mediæval codes, which have been preserved. The examination completed, Lord Stowell

<sup>(</sup>c) 3 C. Robinson, 240.

<sup>(</sup>a) See anie, p. 121.

then proceeded to consider whether the situation of the master was such in the particular case before him as to authorise the exercise of this power. We have spoken of this judgment solely in regard to the fact that it establishes a proposition of maritime law. Considering the principle on which that rule is based, it scarcely needs pointing out that the judgment may be, and always has been regarded, as an admirable and conclusive exposition of the duty of a ship-master in relation to the interests of the owners of cargo under extraordinary circumstances, and as such its direct and indirect influence on the whole body of English maritime law has been marked and important.

There is no branch of law of which the basis is now more thoroughly fixed than that of Salvage. For the earliest and clearest enunciation of many of its principles the judgments of Lord Stowell must still be studied, containing as they do the principles which have guided his successors and have established the law. For example, from time to time seamen fall in with derelict vessels. When they bring such ships into a place of safety, saving them from certain loss, they are clearly entitled to a large reward, to the value, indeed, of a large proportion of the property saved, though not necessarily to a half of Such was Lord Stowell's decision in The this value. Aqui'a (d) so long ago as 1798, a decision which from that time forth became the leading authority on this particular point. Sixty-eight years afterwards, in the case of The True Blue (e), the same point was pressed on the

<sup>(</sup>d) 1 C. Robinson, 37.

<sup>(</sup>e) Law Reports, 1 Privy Council, 250.

attention of the Privy Council. But this Court considered that it was sufficient to refer to Lord Stowell's early decision, to take note of his research into the older authorities, and of his conclusion that the proper mode of deciding the question of the amount of reward to be given to salvors of a derelict vessel was "to consider all the circumstances, including the value of the property salved, and the risk to the property of the salvors."

Nor would it be easy to find a principle of salvage law more necessary for the interests of shipowners, and of those honestly desirous of rendering assistance to vessels in distress on reasonable terms, than that men who have taken possession of a ship as salvors have a legal interest in her which cannot be divested until an adjudication takes place in a court possessed of competent authority. Therefore, a second band of salvors has no right to take away from men who are doing their best to save life and property the opportunity of earning a reward, unless it be apparent that these efforts are altogether powerless to effect their object. Twice Lord Stowell laid down these rules with emphasis and clearness; so that from the date of the two decisions—one in 1809, The Maria (f), and the other in 1814, The Blenden Hall (g), this proposition has been a clear rule of maritime conduct. It is not unworthy of note, as showing the character of naval life at the time of these cases, that in both instances those whom we may call the piratical salvors, the second band who tried to dispossess those who had first tendered their services, were officers and men of the Royal Navy, proving that some-

<sup>(</sup>f) Edwards, 177.

<sup>(</sup>a) 1 Dodson, 418.

times, at the beginning of the nineteenth century, the wild and unscrupulous daring of the Elizabethan seamen was emulated by their modern successors.

Leaving this subject, though we have by no means exhausted the various decisions in which Lord Stowell built up the modern English law of salvage, we pass on to his judgment on the question of the sailor's lien on the ship for his wages. The judgment delivered in the case of The Neptune (h) in 1824, stands out just as remarkably as the decision in that of The Gratitudine (i), expounding and laying down as it does a principle of maritime law of the most vital importance. In the first place, it diminished largely the effect of the old maritime rule of English law that freight is the mother of wages, confining that maxim to cases where a vessel has wholly perished. It also, while laying down the principle that a seaman has a lien on the ship on which he has served to the last plank, expanded it, so that while it gave him this privilege it thereby prevented him from becoming entitled to any extra reward as a salvor. Lord Stowell viewed the matter from no narrow standpoint, and he decided the first point on the ground "private justice and public utility range themselves decidedly on that side of the question which sustains the claim of the mariner." To have held, however, that a crew bound to do their utmost in the service of the owner if the ship is in peril, should be able to assume the character of salvors, so that in time of danger they should be seeking for extra remuneration, would obviously have dealt a blow to the sense of duty

<sup>(</sup>h) 1 Haggard, 227.

<sup>(</sup>i) 3 C. Robinson, 240.

of seamen, and would have given opportunities for gross frauds on owners of vessels by unscrupulous officers and crews.

This chapter is not a criticism of Lord Stowell as a judge, but an attempt to show how considerable was his influence on a particular part of English jurisprudence. His own words in the conclusion of his judgment in The Neptune (k) (1824) show so clearly the various features of his judgments which have enabled them to influence English law so greatly that it is pertinent to transcribe them here. "Upon all these grounds," he says, "of the general practice of Maritime States, upon the just policy of the rule, its simplicity and convenience, upon the legal nature and duration of the original contract, and upon the understanding of the law which has generally, though silently, prevailed, I adhere to the spirit, I had nearly, said the letter, of what I am reminded of having said in a former case not exactly upon this question—that the seaman had a right to cling to the last plank of his ship in satisfaction of his wages or part of them. Be it remembered that by the general and just policy of all Maritime States, the total loss of the ship occasioned solely by the act of God visiting the deep with storms and tempest, brings with it the loss of all the earned wages (except advances), although the general rule of law is, that the act of God prejudices no man; and although the mariner has contributed nothing to the mischance, but exerted his utmost endeavour to prevent it; and although he is prohibited by law from protecting himself from loss by insurance, it

<sup>(</sup>k) 1 Haggard, 227.

is surely a moderate compensation for these disadvantages, that he shall be entitled upon the parts saved so far as they will go in satisfaction of his wages already earned by past services and perils." Some judges, though they have been eminent for their knowledge of legal principles and legal decisions, have wanted that practical sagacity which enables them to see the bearing on practical affairs of legal rules. A judge of this character, placed in Lord Stowell's position, would have failed to rival him in influence because his judgments would have been wanting in practical point, and would have been too over-weighted with legal learning. Other judges distinguished for mental clear sight, for appreciation of every-day difficulties, and for a power of elucidating facts, have not had a grasp of legal principles equal to their common sense. A judge of this class would not have had that sound basis of legal knowledge which would have enabled his judgments to be received in after years with absolute confidence. There have been judges, too, most careful in the precise and accurate exposition of their opinions, yet wanting in breadth of view, and there have been judges who have been gifted with a power of forcible or pleasing expression who have not been great lawyers. Thus it is clear that the moulding of English maritime law at the beginning of this century was largely affected by the circumstance that in the Admiralty Court Lord Stowell presided, happily gifted with a rare combination of remarkable qualities.

Famous painters have often left behind them pupils who have passed on their style and influence. If it is allowable to call one judge the pupil of another, it may be

said that Lord Stowell's successor, Sir Christopher Robinson, was in some senses his pupil. The direct and indirect influence of Lord Stowell is constantly seen in the judgments of Sir Christopher Robinson. Nor is this to be wondered at, because he was the first to report the judgments delivered in the Court of Admiralty, and he had for years sat at the feet of a great master of law. He, therefore, had a natural reverence for the decisions of Lord Stowell. He directly acted on these when he was able to do so, and to some extent he caught Lord Stowell's broad and clear manner of reasoning and of expression. The principles of Admiralty law are now among the best defined, and the most certain of any part of English jurisprudence. This, no doubt, arises to some extent from the fact that it is not in itself an intricate subject. The right to salvage, to wages, the responsibility for collisions at sea, when elementary principles have been laid down, depend largely on questions of fact. But that these principles have been established in a broad, a clear, and a satisfactory manner, is owing to the judicial influence of Lord Stowell at the end of the eighteenth and the beginning of the nineteenth century.

The circumstances under which he delivered his judgments, which have been already pointed out, make it easier to observe Lord Stowell's influence than it is to note that of other judges, and a consideration of his most remarkable decisions enables us to estimate his judicial authority, to take him as a leading example of the way in which English law has been formulated by the Bench, and also to regard these decisions as legal landmarks. It must not be supposed that an undue importance is to be attached

to them over that of other and later judges in the other courts of the country. Such judges as Sir George Jessel, Mr. Justice Willes, Sir Cresswell Cresswell, and others, have each and all had an influence on the current of our jurisprudence. But not one of them was so favourably placed as Lord Stowell for the purpose of impressing a clearly defined individual mark on two branches of English law.

As a creator of prize law, the position of Lord Stowell is of the first importance in the history of English juris-England has produced no great writers on prudence. International Law, and at the time (1798) when Lord Stowell took his seat on the Bench, there had never been any enunciation in England of the principles of prize law by a writer of eminence. Lord Stowell's predecessor, Sir James Marriott, though a careful lawyer, had neither the capacity nor the inclination to formulate his judgments so that they should be expositions of prize law on the subjects to which they relate, and when Lord Stowell (or Sir William Scott as he was at that time) became a judge there was no ascertained body of prize law in this country. It was at the best a mixture of meagre and fragmentary reports, of professional tradition, and of general judicial opinion. The particular gifts of Lord Stowell have already been stated, more especially his power of lucid exposition, and of the statement of principles in striking language. Nor could there have been found a subject more suitable for the exhibition of his particular qualities and special learning than that of prize law. The opportunity thus presented was seized without hesitation. "I trust," he says in one of his most memorable judgments, "that it has not escaped my anxious recollection for one moment what it is the duty of my station calls for from me; namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some belligerent" (l). It was in this large judicial spirit that Lord Stowell approached the decision of the several questions of principle which from time to time arose amidst the hurry of business in a Prize Court in a time of war when English privateers daily brought prizes into port.

Lord Stowell had another piece of good fortune. Dr. Christopher Robinson his Boswell awaited him. Lord Stowell was appointed judge of the High Court of Admiralty on the 26th October, 1798, when the war with France, which had commenced in 1793, was in progress, and Dr. Christopher Robinson at once set to work to enshrine the decisions of the new judge in a series of reports. "The honor and interest of our own country," he writes in the preface to his reports, "are too deeply and extensively involved in its administration of the Law of Nations, not to render it highly proper to be known here at home, in what manner and upon what principles. its tribunals administer that species of law; and to foreign States and their subjects, whose commercial concerns are every day discussed and decided in those Courts, it is surely not less expedient that such information should be given."

<sup>(1)</sup> The Maria, 1 C. Rob. 350.

The first volume of these reports was published in 1799, and from the decision of Lord Stowell in The Vigilantia, delivered on November 6th, 1798, there grew year by year a collection of judgments which ultimately formed a body of English prize law of greater importance and weight than the most elaborate of treatises. Rules were tested by realities, and each statement of principle was illustrated by the facts of an actual incident. In a word, by the genius -for it was little less-of Lord Stowell, England alone of European powers at the end of the Napoleonic Wars-for, as already stated, he did not retire till 1828-possessed a clear code of prize law binding henceforth on the successors of this remarkable jurist. For the best part of half a century this body of law crystallised in the pages of text-writers, and it was not until the war between Great Britain and Russia, in 1854, that it was subjected to judicial criticism. As a general code, it may be regarded as having been followed and approved, though as was to be expected of a series of decisions extending over a long period a few contradictions and imperfections were visible, which were corrected by the Privy Council in 1854 and 1855.

The mass of definite law which was created by Lord Stowell is so large that to refer to his decisions case by case in order to exemplify the preceding statements would fill a volume; but a few instances may be given to explain the rapid influence of this eminent man on this particular body of jurisprudence. If we take the question of contraband, we find a number of articles which were, it was obvious, not absolutely contraband, but were, in legal phraseology, ancipitis usûs, in other words they

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were conditional contraband. When the judicial career of Lord Stowell began, he found no fixed or definite test by which it could be decided whether one important class of these articles, namely provisions, was contraband, but within a few months of his appointment he had stated a rule in regard to foodstuffs which reduced some of this chaos into order, a rule which he continued to apply year after year. "But the most important distinction is whether the articles were intended for the ordinary use of life or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. Contra, if the great predominant character of a port be that of a port of naval-military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article ancipitis usûs, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful" (m).

<sup>(</sup>m) The Jonge Margaretha, 1 C. Rob. 189; 1 English Prize Cases, 100.

Another and interesting example of Lord Stowell's particular capacity and apt manner is the case of The Daifie (n), in which he laid down clearly the principle on which the Court should act in regard to cartel ships-"on general principles I must lay it down as clear that ships are to be protected in this office ad eundum et redeundum, both in carrying prisoners and returning from that service." But having stated this principle, the judge had to decide whether in the particular case before him the vessels were entitled to the privilege accorded to a cartel ship, since they were only going to a port to take prisoners on board. This point enabled Lord Stowell to deliver his opinion in the manner at once actuated by common sense and by a broad spirit of equity, which give his judgments a resemblance to the speeches of Burke. He would extend the principle so as to include vessels if they had been placed in a state of actual preparation and were going in good faith to commence the To state these conclusions in this bald manner inadequately expresses the importance of their incorporation definitely and permanently in a system of law which is based on judicial precedents. By one man in a day a rule of English law was formulated and explained which in other systems could only be collected from the unauthorised treatises of learned professors and decrees of officials which might or might not be acted on by a prize court.

It has sometimes been asserted that the inclination of Lord Stowell's mind was in favour of belligerents as

<sup>(</sup>n) 3 C. Rob. 139; 1 English Prize Cases, 273.

against neutrals—in other words, of his own country. The extract already given from the case of *The Maria* shows, on the contrary, his desire to be fair to both parties, and of this his statement of the law in regard to the destruction of neutral prizes is an illustration. Lord Stowell decided once for all that however meritorious in the view of his own Government may have been the destruction of a neutral ship and cargo by the captain of a belligerent ship of war, the owners must receive full compensation, because the safe and proper course is to allow the vessel to go free, if it cannot be brought into port for adjudication (o). These judgements were not given till 1815 and 1819, but probably during the long course of the Napoleonic war decisions similar but unreported were delivered.

The work of Lord Stowell as a creator of maritime law is necessarily to some extent obscured by the abundant decisions which year by year have accumulated on the judicial foundations which he laid. But his work as judge of the Prize Court remains to this day distinct and conspicuous, and no changes of international law can ever diminish his fame as the creator of a great body of English prize law, the only complete and judicially made code in existence among European nations. For it should be borne in mind that in the eighteenth century England was the only nation having a well-established judicial Prize Court. Her main maritime opponent, France, received a Prize Court, the Conseil des Prises, from Louis XIV. in 1659, but with other bodies of the

<sup>(</sup>o) The Acteon, 2 Dodson, 48; 2 English Prize Cases, 209: The Felicity, 2 Dodson, 381; 2 English Prize Cases, 233.

old régime it disappeared at the Revolution, and its jurisdiction by the Law of 3 brum: an IV. was transferred to the Tribunals of Commerce. It reappeared again in 1800, and was presided over by a Counsellor of State, together with eight other members. At the best it was only a semi-judicial body; its functions were strictly limited to the decision of the question as to the validity of a capture; its sittings were not open to the public, and it was not bound by precedents. Of other countries, Spain and Russia had nothing in the shape of a judicial tribunal, and Germany as a nation did not exist. Through a fortuitous combination of events, and especially through the fortunate circumstance that a jurist peculiarly fitted for the post occupied the judgment seat of the national Prize Court, Great Britain became possessed of a clear and definite body of prize law.

## CHAPTER VII.

## THE PROGRESS OF THE LAW OF EVIDENCE.

Those who have hoped that with the growth of democratic institutions, with increase of education and of national wealth, there would come also peace and order, municipal and international, have oftentimes been grievously dis-Progress has been spasmodic and halting, appointed. and the world is full of inequalities. But in one respect, at any rate, Great Britain may be congratulated on having steadily marched forward, not swiftly, indeed, sometimes with halts which to-day seem ludicrous, oftentimes with timidity. Her legal system has, in the last hundred years, become clearer, less technical, and more calculated to assist the cause of justice. No more remarkable step in this direction, one which completes the reform of a particular and most important branch of the municipal law of England, is to be found than the passing of the Criminal Evidence Act in 1898. From the beginning of the nineteenth century the law of evidence was continually growing more reasonable and more simple, while at the same time it has been a constant battle-ground of those who have advocated and those who have opposed the amendment of the law both in and out of Parliament.

In 1824 Lord Denman, then an eminent member of the bar, contributed an article to the Edinburgh Review on

the subject of Evidence in Courts of Law. It was based on Bentham's "Traité des Preuves Judiciaires," and put forward views in regard to the law of evidence which, though at the moment they were considerably in advance of the legal and general ideas of the age, were yet, in due time, certain of acceptance. For the theories and opinions of Bentham, who was regarded as an unpractical philosopher, were, by the publication of this article, shown to be accepted by an important and influential section of the legal profession and of the general public, which was determined to put an end to some of the absurd and illogical rules of evidence then in existence. of that article was that there should be no exclusion of the evidence of persons who could throw light on the question which was before the court for decision, with two exceptions. In other words, every party to a civil action, and every prosecutor and prisoner in a criminal trial, ought to be allowed to give evidence, with the exception that confidential communications made by a client to his legal adviser need not be disclosed, and that married persons were disqualified as witnesses for or against each other. The negative of these two main propositions contained in a nutshell the most remarkable and the most startling of the rules of legal practice, in regard to evidence, at the beginning of the present century. The fact that a certain person was interested, in a greater or less degree, in the result of a trial was supposed to prevent him from testifying to the truth. Lord Denman, in the article in question, takes as an example of this practice the case of forgery.

<sup>&</sup>quot;Unless the crime," he writes, "has been committed in .

the presence of witnesses, it can only be proved (in the proper sense of the word) by the individual whose name is said to have been forged. Yet that person is the only one whom the law of England prohibits from proving the fact. The trial proceeds in the presence of the person whose name is said to have been forged, who alone knows the fact and has no motive for misrepresenting it. statement would at once convict the prisoner if guilty, or if innocent relieve him from the charge; and he is condemned to sit by hearing the case imperfectly proceeding by the opinions and surmises of other persons on the speculative question whether or not the handwriting is his." Unquestionably, at the beginning of the last century English law had lost sight of the fundamental truth which was well stated by Bentham, "that evidence is the basis of justice; to exclude evidence is to exclude justice." There followed from this principle what may be termed the practical rule—"Let in the light of evidence. The exception will be, except when the letting in of such light is attended with preponderant collateral inconvenience, in the shape of vexation, expense, and delay."

Forgetting, as we have said, that the exclusion of evidence is the exclusion of justice, English law made the exception the rule; in other words, there were so many restrictions on their competency that the most important witnesses were excluded from giving evidence.

To those who have seen Bentham's principles in regard to evidence at length carried in their totality into effect, it is hardly possible to understand a state of opinion, legal and general, which could have retarded this complete development for a century. For this period, speaking broadly, it took to make them active legal rules. Bentham published his treatise on judicial evidence in 1813; two years before the completion of the nineteenth century the edifice was finally crowned.

The remarkable feature of these movements and changes is the long time it has taken not to effect the establishing of some strange constitutional or legal theories, but to place on the Statute-book and in the Common Law of England rules based, not on subtle philosophics, but on common sense and sound reason.

Bentham on this point represented the modern spirit; it is now a truism to reiterate that utility was the foundation of his philosophical as well as of his legal theories. What we understand by utility has been the characteristic of all the legal changes of the present century. cheapness, absence of formality and technicality, even perhaps an unreasonable contempt for things which have had their use in times gone by, have been visible in every one of the legal movements of modern times. There never was a more business-like philosopher than Bentham; he epitomised modern thought in regard to English law to an astonishing degree. He saw through a maze of precedent, of forms and technicalities, he put his finger on the object of the law, and he had a perfect contempt for professional tradition and timidity. If there is one thing more than another which the modern man of business, at any rate to a recent date, believed in, it is that lawyers were essentially "fee collecting," that they put their own interests first and foremost. Bentham wrote of the lawyers in the beginning of the nineteenth century as the man in the street often talked of them at its end. Therefore, in regarding law reforms, in observing how almost everything that Bentham advocated in the beginning of the century has come to pass, it is necessary, while giving him all credit for a rare foresight, not to overrate his influence. He was not, we must repeat, a man who put forward strange theories; he only gave expression to modern opinions before the country was ripe for them. He had not to convert an unbelieving world, because his ideas on English law were those which would occur to every man of common sense when the community as a whole began to interest itself in the subject, and to feel the necessity for a system which was in harmony with modern needs. Bentham, when men read him in more recent years, was in the position of the leader-writer who states in language which the man in the street cannot The value command the thoughts of that individual. of Bentham's writings to the cause of law reform, more especially to the reform of the law of evidence, was that those who saw that the state of things was unsatisfactory found in his writings the remedies for it set out with lucidity, and even with eloquence, and the absurdity of old-fashioned technicalities exposed with keenness and humour. To some extent, of course, the perusal of his writings would set some minds thinking, but, allowing for this, it is certain that Bentham's great merit was that he voiced the feeling of the public as against too conservative lawyers rather in the period which followed his life than during his own time.

But though the state of the law of evidence before the middle of this century was justly open to adverse criticism, though it was not in accord with the changes in English society, and its mediæval form was maintained through the timidity of eminent lawyers for too long a time, we ought not to regard it as if it were something wholly absurd and unreasonable. It was perfectly rational in its origin, and it had at one time conduced to the national welfare; all that could be said against it was that it retained its mediæval shape till it had become an inconvenient anachronism.

Let us go back for a moment to the twelfth and thirteenth centuries. We must get rid, in the first place, of the idea of the modern trial, of a case opened by an advocate. In a rude state of society prosecutor and prisoner, plaintiff and defendant, tell their own tale. Anyone who will go to-day to a County Court and see Jones and Robinson, who are concerned in a dispute about a few shillings, each go into the witness-box and state their respective cases without the intervention of lawyers, will obtain some idea of the mediæval trial. "The litigants in court debate the cause, formal assertion being met by formal negation" (a). Thus in the simplest state of society, the parties in stating their case practically gave their evidence. But if assertion and denial were not enough one of the parties had to go to the proof-"one of the two litigants must prove his case by his body in battle, or by a one-sided ordeal, or by an oath with oathhelpers, or by the oaths of witnesses." But gradually

<sup>(</sup>a) Pollock and Maitland's History of English Law, Vol. II. p. 599.

superseding this old procedure came "the proof given by the verdict of a sworn inquest of neighbours or proof by the country"—of this we shall have something to say presently, but for the moment the point which requires to be emphasised in regard to the law of evidence is that the jury were really the witnesses.

"The jurors must be free and lawful, impartial and disinterested, neither the enemies nor the too close friends of either litigant. We must not think of them as coming into court ignorant, like their modern successors, of the cases about which they will have to speak. In every case the writ that summons them will define some question about which their verdict is wanted. . . . It is the duty of the jurors, so soon as they have been summoned, to make enquiries about the fact of which they will have to speak when they come before the court. They must collect testimony, they must weigh it and state the net result in a verdict."

We are not now discussing the history of trial by jury, but it is impossible to pass over the effect of this institution on the law of evidence. At the base of the whole later edifice of technicality and judicial decisions which cumbered the law of evidence, we see clearly the principle that the men of the district, the jury, were in a real sense the witnesses, and that the interested party having stated his case his share of the business was done. He was not to be examined and cross-examined, because his neighbours were there to say if his story was true or untrue. The parties to the litigation have put themselves upon a certain test; that test is the voice of the country. It is

true that the modern form of trial by witnesses pure and simple seemed at one time to be growing, but it did not flourish. "Very soon it seems to be confined to one small class of cases, that in which a would-be widow is met by the plea that her husband is still alive; but the main institute of all new procedure is the inquest of the country." Growing out of this great central principle came another, that the parties were not to be examined and cross-examined—one may say were not to be tortured—their testimony was not to be extracted from them in secret. Thus the very rule which, in modern times under happier social conditions, became not only an inconvenience but a positive injustice, was in the middle ages a valuable safeguard of the individual.

"Our criminal procedure took permanent shape at an early time, and it had hardly any place for a law of evidence. It had emancipated itself from the old formulated oaths, and it trusted for a while to the rough verdict of the countyside without caring to investigate the logical processes, if logical they were, of which that verdict was the outcome."

Thus, to quote again from the same authors, since by so doing we can put the matter before our readers in the clearest manner, "we escaped secrecy and torture." On the Continent, under the influence of the Canon Law and of ecclesiastics, "torture stole into the courts, both temporal and ecclesiastical," where, in order to get the full proof, to make the prisoner convict himself, it was used. No doubt much crime went unpunished in England; on the other hand, an innocent man felt that he would not unjustly lose his life or his liberty; and certainly also,

if we look beyond the law, there can be no doubt that the system helped to give Englishmen that feeling for fairness and for judicial impartiality which has characterised the Anglo-Saxon race in the new as much as in the old world. When Bentham poured out on the English law of evidence his volumes of contempt, he voiced the modern spirit, the day of the mediæval system of evidence was done, but that system had in its time conduced in no small degree to the happiness of the English people and to the formation of the national character.

But in later times this system was supported by reasons which would never have occurred to the men of the middle ages. It is in accordance with human nature that a man should be inclined to say that which is favourable to himself, and so it was quite easy to evolve the theory that no person should give evidence who had an interest in the subject-matter of a suit. In a decision which involved this question in 1789, namely, whether one underwriter on a policy of marine insurance could give evidence in favour of another who had underwritten the same policy, the test was judicially stated to be, "Is the witness to gain or lose by the event of the cause?" If he could gain, he must not give evidence. The same reason may be found stated in Coke. When or how exactly it crept into English law it is difficult to say. Still more curious was it to make use of this reason in criminal cases. A prosecutor was allowed to give evidence, because the suit, so to speak, was brought by the king. The prisoner could not give evidence because he was an interested party. the true origin of the practice was that the prisoner had chosen as a test of his guilt or innocence the verdict of the

jury, which was something above a judgement founded on actual evidence. "No one is to be convicted of a capital crime by testimony," is a maxim found in the Leges Henrici. A prisoner was seldom questioned in mediæval times; "probably no fixed principle prevented the justices from questioning the accused, but there are no signs of their having done this habitually"—a practice which, whatever its result, did not rest in the least on the reason of interest or no interest.

Sir Fitzjames Stephen, in his History of the Criminal Law, has stated that before the date of the Revolution the prisoner was examined. No doubt during the period when trials by the Star Chamber were frequent this may have occurred. But the political and semi-political trials of the age of the Stuarts, or even of the Tudors, must not be regarded as indicating the state of ordinary criminal justice. A case, for example, such as the trial of Sir Nicholas Throckmorton, in 1554, for high treason, when the proceedings "consisted almost entirely of a verbal duel between Throckmorton and the counsel for the Crown," should not be too much relied on, for, to a certain extent, these special and important trials do not harmonise with the description given by Sir Thomas Smith, Secretary of State to Queen Elizabeth, of an ordinary criminal trial in England. "The judge," says this official, "asketh first the party robbed if he knew the prisoner, and biddeth him look upon him; he saith, yea. The prisoner sometimes saith nay." The prosecutor describes the robbery more in detail, and then "The thief will say, no, and so they stand awhile in altercation" (b).

<sup>(</sup>b) Stephen's History of the Criminal Law, Vol. I., p. 348.

The truth seems to be that there was—as was natural—a certain amount of laxity in the practice, though the theory, arising from the mediæval system and from the anti-canonical character of English law, was that the prisoner ought not to be examined and cross-examined. It became more strict in practice after the destruction of the Stuart dynasty because, in the mind of the nation, the examination and cross-examination of prisoners was associated with the tyranny of the Star Chamber and of the Stuarts.

When, however, the legal system became less chaotic, and it became necessary to apply the law to more complex circumstances, and to have some kind of definite principle by which to test facts, it required little judicial ingenuity, which was always able to support a legal practice by some fiction, to apply the argument of interest to the exclusion of the evidence of prisoners (c). Thus in the eighteenth century, precedent producing precedent, there had grown up a body of legal rules of the highest technicality, so that the law of evidence was brought into a state which justly merited the wholesale condemnation of Bentham at the beginning of the present century.

In reviewing the history of the law of evidence, the publication of Lord Denman's article in the Edinburgh Review in 1824 may be taken as the starting point of the modern movement. Bentham had shown clearly that

<sup>(</sup>c) The theory of the incompetency of interested parties as witnesses broke down in regard to the evidence of accomplices. "If it should ever be laid down as a practical rule in the administration of justice that the testimony of accomplices should be rejected as incredible, the most mischievous consequences must necessarily ensue." (Charge of Lord Chief Justice Abbott, March, 1820.) This was pure Benthamism.

the existing state of the law of evidence was an anachronism, but this demonstration was not an actual step in advance; the publication of a paper by a person in the position of Lord Denman, though he was then but a member of the Bar, marks some practical progress, however small. In 1824 he was a voice crying in the wilderness; twenty years later he was able to carry into effect, partially at any rate, those legal reforms which he had advocated as a private individual. He had become Lord Chief Justice of England and a member of the House of Lords, public opinion was ripe for a change, and so, in 1843, there was passed the first of the series of statutes which have been gradually changing the law of evidence so as to make it a more efficient instrument of justice.

The preamble of that Act(d) formulated principles which the operative part of it did not by any means carry out. It ran as follows: "Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in criminal and civil cases, should be laid before the persons who are appointed to decide them," certain changes were to be made—namely, that no person should be excluded as a witness by reason of incapacity from crime or interest, except parties to a suit, or the husband and wife of such persons. To us the exception to the new rule may seem so great as to render the Act almost useless, but this is to forget the extraordinary number of persons whom the law regarded as interested parties, so that over and over again the best evidence as to a fact was shut out. Still, however, the rule of the common law which, arising out of those mediæval historical characteristics which we have already referred to—"Nemo in propria causa testis esse debet"—still remained in full vigour. It was a rule which, like many others in the English common law, was supported in judicial decisions by reasons which were historically false. To the popularisation and the cheapening of the law its abolition was immediately due.

The growth of population, more especially in the great towns, the necessity for tribunals to settle the small disputes which are constantly arising, produced the modern County Courts. They revived an archaic procedure, but to all intents and purposes they were new tribunals. Their creator, if the phrase may be used, was Lord Brougham, and they were brought into existence in 1846. The Act by which they were established empowered the parties to any action or proceeding under the Act, or their husbands or wives, to be called as witnesses. As we have already said, in a primitive state of society a party to a dispute tells his own tale-his opening statement, as it may be called, is his evidence. Thus, to some extent, this enactment restored to Englishmen a right of which they had been deprived by misplaced judicial ingenuity. Nor does it require legal knowledge to perceive that the new rule of law was an absolute necessity if the County Courts were to be of any use. In the majority of small disputes which it was the business of the County Court judges to settle, the only people who could give evidence of any value were the parties themselves. A small householder disputes a butcher's bill on the ground that the meat supplied was bad. Who can state the facts on which the judgement of the court is to be based so well as the two persons who are the parties to the dispute? And it

followed, as a matter of course, that two radically different principles of evidence could not exist in the higher and in the lower courts of the country-a modern and businesslike system in courts where shillings were recovered, a mediæval and worn-out system when large sums were in dispute. The two things were incompatible and absurd. It was not, however, till 1851 that an Act (e) was passed which made the parties to any proceeding in a court of justice admissible witnesses. It is astonishing, perhaps, that the ancient rule could have had this precarious existence for a few years when it was not in force in the County Courts. It is still more difficult to realise that the old rule existed in the lifetime of middle-aged men of to-day. The great progress which the country made during the nineteenth century cannot be better understood than by the statement that little more than fifty years ago a man of business who was a plaintiff or a defendant could not give evidence, because it was assumed that he could not be relied on to speak the truth.

But husbands and wives were still precluded from giving evidence when one or the other was a party to an action—an exclusion which was wholly due "to the unyielding opposition of Lord Chancellor Truro and the cautious misgivings of Lord Cranworth, and was found to be of much practical injustice. An attempt was accordingly made to get rid of the difficulty by putting a forced interpretation on the language of the statute. The attempt failed, as it deserved to do, and Lord Brougham had once more recourse to the Legislature." The final step came two years later, and 1853 saw the old rule

at an end in civil actions (f). The retention of the exclusion of proceedings in divorce, a retention which was abolished in 1869, and of the exclusion of criminal proceedings, and of the rule that husbands and wives were not compellable to disclose communications made to each other, cannot be regarded as lessening the general effect of the new legislation.

The consideration of the admission of the evidence of a prisoner cannot be dissevered, when the subject is regarded historically, from that of a party to a suit, for, as we have seen, in modern times the evidence of one and the other was theoretically excluded on the same ground. But during the half-century in which the recently accomplished change has been under discussion, the rule has been supported and opposed on much broader grounds; the legal fiction has, indeed, been almost wholly thrown overboard. Bit by bit the rule has been pared away during the last twenty years. For the first twenty years after the passing of the statutes which allowed parties to actions to give evidence, the question of the admission of prisoners' evidence lay at rest. But from 1872 onwards a series of statutes came into force by which in certain cases the party charged with an offence has been empowered to give evidence in his own behalf. example is desirable. We take it from the Sale of Food and Drugs Act, 1875. By that statute a person who, after analysis by a public official of a substance, was considered to have committed an offence under the Act. was liable to a penalty if found guilty before justices. By the twenty-first section of the Act "the defendant may, if he think fit, tender himself and his wife to be

<sup>(</sup>f) 16 & 17 Viet. c. 83.

examined on his behalf." When the Act of 1898 was under discussion in Parliament, the supporters of the measure rightly called attention to this series of statutes. It was said, in reply, that they were rather civil than criminal proceedings; but such an Act as we have just referred to creates a criminal offence, and a sanction: it adds a piece to the criminal law of the country. But even if such an argument had been correct in regard to some of the recent statutes, it clearly was not in regard to the Criminal Law Amendment Act, 1885, by which persons accused of various offences against women were entitled to give evidence. Though that statute has been a good deal criticised, it has never been suggested that it should be repealed. Nor, when these criticisms are examined, can they be said to have much weight. common sense of the country finds it absurd that two different systems of evidence should be applicable to the trial of different offences against the criminal law.

It is curious to note, however, that while this series of Acts was being placed on the Statute-book, a change in the general legal principle was being successfully opposed. The occurrences of the particular period are very clearly set out in a leading work on the law of evidence:— "So far back as 1878, an attempt was made by the Government to deal with the matter in accordance with the principle of these statutes. The Criminal Code Bill of that year contained a clause to the effect that every one accused of any indictable offence might make a statement on which he might be cross-examined, &c., but added the important proviso that 'the defendant should not be sworn as a witness, nor be liable to any punishment for making false statements.' The commissioners (Lord

Blackburn, Barry, J., Lush, J., and Sir James Fitzjames Stephen, Q.C.) to whom this Bill was referred, were divided in opinion as regarded 'the policy of a change in the law so important,' but were, on the whole, of opinion that, 'if the accused was to be admitted to give evidence on his own behalf, he should do so on the same conditions as other witnesses, subject to some special protection in regard to cross-examination.' They put forward a clause, which was subsequently embodied in other Criminal Code Bills, to the effect that an accused person, and the husband or wife of an accused person, should be competent but not compellable witnesses, and liable to a cross-examination, which the Court might limit so far as it might extend to credit. A bill of 1880 was referred to a Select Committee of the House of Commons, whose sittings were cut short by a dissolution, with the result that no 'Criminal Code Bill' has since then been re-introduced. For very many years, however, the late Lord Bramwell in the House of Lords, and successive law officers in the House of Commons, have brought forward 'Criminal Evidence' Bills to the same effect as the clause of the Criminal Code Bill, by which it was proposed that accused persons should be competent witnesses, and Lord Bramwell's Bill frequently passed the House of Lords. In 1888 the Government Bill was fully debated in the House of Commons, but though very strongly supported, failed to pass, on the ground of Irish members not being able to obtain the exclusion of Ireland from its operation.

"In 1892 a similar Criminal Evidence Bill passed the House of Lords, and also passed a second reading in the House of Commons. It was then referred to the Standing

Committee on Law, but too late to pass before the dissolution of Parliament in that year "(g).

When the opposition to the change is impartially looked at, it will be seen that it was based rather on apprehensions than on facts, and it must be candidly stated that if apprehensions such as have been expressed both by eminent judges and by members in debate in Parliament in regard to this and similar legal changes had been allowed to have weight, it is doubtful if any of the legal reforms of the last century would now be accomplished facts. when one looks back to all the gloomy prophecies which have been uttered about every alteration in the law during the last eighty years, the warnings of fin de siècle conservatives-who in regard to legal changes are not confined to one side of the House-almost produce a smile. When, in 1851, it was proposed to allow parties interested in a civil action to give evidence, the Lord Chancellor (Lord Truro) solemnly said that "when the parties were examined the difficulty of discovering the truth was rather increased," and that if a husband or a wife could be examined it would put an end to that connubial confidence "essential to real happiness." So impressed was Parliament with this argument that, as we have already related, this latter change was postponed for some years. In many respects the opposition to a change in criminal trials was a satisfactory feature in public life, for it showed a strong desire that innocent men should not be prejudiced by having to give evidence, and that judicial impartiality should not suffer. The present, or rather the late, proce-

<sup>(</sup>g) Best's Principles of the Law of Evidence, 8th ed. p. 572.

dure, wrote Sir Fitzjames Stephen, "contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually aims at the appearance of harshness, not to say cruelty, which often shocks an English spectator in a French court of justice, and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. On the other hand, I am convinced, by much experience, that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why, in the case of the guilty, there need be any hardship about it."

Here, in a nutshell, stripped of the verbiage of parliamentary debate and of newspaper discussion, are the two opposite arguments. The conclusion at which this high authority arrived was that the evidence of prisoners ought to be admissible. With their evidence already admissible here in a certain number of criminal cases, and in British colonies and the United States, and with the parties to civil proceedings allowed to give evidence, it was obvious that the final step could not be long delayed. That the proposed change had been introduced into the colonies was less dwelt on in the debates in Parliament than it deserved to be. For an assimilation of the legal systems of the mother country and of the colonies is a practical step towards that federation of the Empire which is a text for so much after-dinner and platform eloquence. A change of this nature in the colonies may also show that where common sense is less hampered by judicial and constitutional precedents it has prevailed. To cite only two instances—the reform in question was carried into operation in Canada in 1893, and in Victoria in the preceding year.

The main provisions on this point of the Canada Evidence Act, 1893 (56 Vict. c. 31), are of sufficient interest to be briefly stated. It enacts in section three that a person shall not be incompetent to give evidence by reason of interest or crime, and in section four that every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness. Finally, in sub-section two, the failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution.

The final result of the discussions which went on for so many years in this country was the passing of the Criminal Evidence Act, 1898 (h), by which a prisoner is now entitled upon, and only upon, his own application to be called as a witness; but if such application is not made the prosecution is not to comment upon the fact. This proviso was inserted to prevent an innocent prisoner, who might think that his cause was best served by his silence, from being prejudiced by his non-appearance in the witness-box. But the Act did not prevent the judge from commenting on this fact, and the proviso seems to lose sight of the ordinary common sense of mankind. Nothing will ever prevent twelve men in the jury-box from forming an opinion unfavourable to a prisoner who declines to exercise the right which the law now gives him. It would be impossible—except in the clearest cases either of guilt or innocence—that it should not be so. If the

<sup>(</sup>h) 61 & 62 Vict. c. 36.

person who can best explain a set of facts will not do so, an ordinary man will assume that he is unable to give a satisfactory explanation of his con-Nor can it be admitted that such a state of things is undesirable; the statute was not passed that the guilty might escape, and if it adds to the certainties of a conviction when a prisoner deserves it, so much the better. The main object of the Act was that the innocent might be able to explain circumstances in full detail. That perjury may be committed under it is quite certain, but the difference between the state of things before and since the Act came into operation is, that formerly a prisoner would, when asked if he had anything to say, assert an untruth without the solemnity of an oath, now he will do the same thing having previously taken an oath. Many guilty prisoners, of course, always assert their innocence. As regards prisoners who are innocent the Act is a protection to the more ignorant members of the community. It has been said that a prisoner is more likely than an ordinary witness to be disturbed by his position. But this is doubtful. To stand in a witness-box in a crowded court is trying enough to most people. Still every day old persons, women, girlsthe most nervous and the most inexperienced—pass satisfactorily through the ordeal. In ninety-nine out of every hundred cases of innocent persons being on their trial it will be not only a satisfaction, but a thing tending to encourage and strengthen them, to know that they will be able to give with minuteness their account of the facts of the case, to explain discrepancies and points which may tell against the accused without some elucidation by the prisoner.

More especially is the Act valuable in the smaller criminal cases, in those which are being tried every day in the magistrates' Courts. Take, for example, the case of a man charged with trespass in pursuit of game. The only witness against him is a gamekeeper, an habitual prosecutor, pleased to show his zeal in his calling, prejudiced almost of necessity. The prisoner, under the old practice, was able of course to make a statement. He says something short and not very clear, and is found guilty and sentenced. But the very fact that under the recent Act the man can give sworn testimony at once increases the value of what is said; when he can be asked some question which will clear up what is obscure, an explanation which, at first sight, may not be easy to understand, becomes comprehensible. In addition, in such a case as we are supposing, it is probable that the witness for the prosecution will give his statement more carefully than formerly, because he will know that what he says will be weighed in the balance against conflicting testimony. Thus it is in the small criminal cases more than those of greater importance that the evidence of the prisoner will be valuable.

Nor has the fear that the prisoner would be subjected by the new system to something like a moral torture been realised. It was creditable to the hearts of those who used this argument that it was so much pressed, but after all English justice is, allowing for human imperfections, carried out humanely and considerately. It is not every judge of the High Court who, under ordinary circumstances in a civil suit, can from time to time refrain from cross-examining a witness. Nor is it likely that a judge in a criminal prosecution will always abstain from questioning a prisoner. Indeed, in some instances, more especially in the inferior courts, some questions put judicially, and with a view of clearing up obscurities, are actually necessary. For the truth is that it is impossible in regard to evidence always to adhere quite strictly to theories. To do so is to become pedantic. What is required is that the theoretical rule should be the general rule of conduct; and as there is no direct rule against the intervention of the judge it is obviously allowable. And the traditions of English justice are so contrary to anything like the continental systems, and the sense of the country is so pronounced on the point, that these two factors prevent any injustice being done to prisoners.

So far as regards the actual working of the Act, not only does it work well, but it would appear that cases have occurred in which it is highly probable—more than this, perhaps, should not be said—that had it not been for the opportunity given to the prisoner of explaining details he would have been wrongly convicted. But if such opinions are correct, they are sufficient not only to justify the passing of this measure, but to cause among all reasonable men some regret that it did not sooner become the law of the land.

The Act does not apply to Ireland, Irish members of Parliament having shown great dislike to any such change in the law, yet the arguments in its favour were equally applicable to Ireland, and its limitation to England and Wales was merely a concession to local prejudices. Irish members in recent years have felt, or have professed to feel, great distrust of the Criminal Courts, and where the impartiality of the tribunals cannot be trusted it is natural to fear that the examination and cross-examination of prisoners may be abused. The introduction of this procedure in England is the strongest possible testimony to the general confidence in judges, juries, and magistrates, and in the justice administered in the English Criminal Courts.

Although the competency of parties and prisoners as witnesses is the main subject which we have considered, there are yet some other points in regard to the developement of the English law of evidence which should not be left out of sight. No greater change in the law of evidence, except those to which allusion has already been made, can be found than was introduced by the rules made under the authority of the Supreme Court of Judicature Act, 1873, by which a broad and definite rule was laid down "that in the absence of any agreement in writing . . . the witnesses at the trial of any action shall be examined vivâ voce and in open court."

This was a complete reversal of the existing practice of the Court of Chancery, in which every question of fact was tried by means of affidavits. Sometimes, indeed, a witness who had given his version of the facts on paper was called for cross-examination, but the actual and existing system was that the trial took place on documentary evidence. No more unsatisfactory system could have been devised. It tended to delay, to expense, and to difficulties in the decision of comparatively simple issues of fact. It was a system, also, which was wholly unsuited to many

modern cases, to points arising on scientific questions which were wholly unknown to the Court of Chancery in former days. Like the other great changes to which we have referred, it marks the effect of the spirit of the age on the law, which is, as cannot be too often repeated, a mirror of contemporary ideas. The hurry, the rapidity of modern business, is reflected in the practice of the law. It is complained that judgements are now less elaborate, that strict rules of evidence are neglected, and that trials tend to become more like arbitrations before laymen. In this we see the Law Courts showing, slowly indeed, but none the less clearly, characteristics of the business community, which has a powerful influence on English law at the present day.

It is even yet doubtful whether the system of vivâ voce evidence might not be carried further. At present a motion, say for an interim injunction, to prevent the erection of a building so as to obscure the light of another building, is supported by affidavits. It may be doubted whether in many of these cases, which, indeed, are sometimes treated as the trial of the action, it would not be quicker and more satisfactory if the facts were proved by a witness in court.

There is, however, this observation to be made upon the system of vivâ voce evidence, that it is certainly open to abuse in regard to the number of witnesses. The more witnesses the greater is the expense, and, it must be added, also the profits to the solicitor. Certainly the present fault of the existing system of evidence lies in the many witnesses who are either called or are in readiness to be

It is a blot which adds much to the cost of litigation, which becomes very often out of all proportion to the amount at stake. A mere multiplication of witnesses does not add strength to the case of a litigant. and over and over again it may be seen that if two or three witnesses support a case efficiently it is not improved by half-a-dozen more. Indeed, there is a positive danger in a large number of witnesses, since among many it is seldom that one or two weak vessels are not to be found, who may actually detract from the force of the evidence of previous witnesses. In actions which involve some technical skill this multiplication of evidence is most conspicuous. It is a weakness in the present system which can only be checked by the judges before whom cases are tried. To leave the propriety of calling or having at the trial a certain number of witnesses to the official known as the taxing officer is to throw on him a responsibility which it is impossible for him to discharge in many cases as well as the judge who has tried the case. Where a judge considers that a case has been overloaded with evidence, it is very desirable that he should state this view in court, and give directions accordingly in regard to costs. If this practice were adopted, a practical step towards lessening the costs of litigation would have been taken without in any way diminishing the efficiency of modern trials.

In regard to affidavits there is yet another observation of a general kind to be made. The time appears to have arrived when, in the course of litigation, their number might be diminished. They are so common as not only to be of no more value than unsworn statements, but also,

by this very commonness, they detract from the solemnity of oaths in general. For example, in the course of litigation each party has to make what is technically called an affidavit of documents. This affidavit is simply a common form with two schedules at the end which are filled up, and then the litigant is sworn to the affidavit before a commissioner. But a statement unsworn, giving in similar form the details of the documents relating to the case, would be as satisfactory. If, at the present time, a document is omitted, and the opposite party discovers it, an application is made for a further and better affidavit. But the person who has made the affidavit is no worse for the omission. We cite this particular detail of practice merely as an example. The general proposition which we state is that affidavits should be diminished, and should be used, not as formal pieces of legal machinery, but only when it is absolutely desirable and necessary in the interests of justice that a statement should be made upon oath.

A change of this kind would be entirely in harmony with what may be termed the businesslike despatch of litigation, under the influence of which documents are now often admitted at trials without strict technical proof, the main desire of the court and the litigants being that a conclusion should be reached with as little of technicality and legal obstruction as possible.

But it is in the Criminal Evidence Act of 1898 that we see this modern tendency in regard to evidence more clearly reflected than in any other statute or rule or practice of recent years. Most persons think of it, and con-

sider it, purely from a practical point of view. To the historical observer, however, it will always be of equal interest, since it is the last, and most important, alteration in one branch of English law, the changes in which we are able to watch with tolerable certainty from century to century.

# CHAPTER VIII.

#### THE HISTORY OF BANKRUPTCY LEGISLATION.

THE history of English bankruptcy legislation must always have a deeper interest for those who are not lawyers, than that which usually belongs to purely legal questions. For it shows with considerable vividness some commercial ideas of different periods of our history, as well as the difficulty of reducing effectually into practice moral and legal theories which in themselves are clear enough. Among the many details and conflicts of procedure which characterise the course of English bankruptcy legislation, some main principles are apparent. These are that there should be a full and rateable distribution of a bankrupt's property among his creditors, that on his discharge a bankrupt should be free from existing liabilities, that property of which a bankrupt was reputed owner should be realised for the benefit of his creditors, and that a bankrupt should be allowed to make a composition with his creditors. These will appear as we follow the course of bankruptcy law, which is more easily traced than that of other branches of our jurisprudence, which depend much on case law. beginning of its existence in this country bankruptcy law has been formulated in the shape of a rude legislative code, which has from time to time been altered or enlarged by Parliament as defects of principle or procedure became apparent, and new legal and social theories came to the top. Nor for the beginning of the history of the law of bankruptcy—an exception as it is to the ordinary law of debtor and creditor—is it necessary to go back to those now distant periods in which legal historians have often to seek for the springs of our streams of law and equity. It appears almost abruptly in the Statute Book, called for by the growing needs of the mercantile community. Commerce, as it is one of the first causes of the prosperity of a people, was also the main factor in the creation of a bankruptcy law.

It may be that, like some of the origins of English maritime law, the theory of a bankruptcy law came from the Mediterranean, for in the trading towns of mediæval Italy a system of bankruptcy law existed from an early period, and before Benevenuto Straccha, a learned lawyer of Ancona, wrote a treatise on the subject in 1584, a bankruptcy law of comparatively an elaborate character must have been in force. Coke places the first bankruptcy statute (a) in England in the reign of Edward III. in the year 1350, and takes a patriotic pride in regarding bankruptcy as a practice introduced by the Lombards, and one not indigenous in England. As a matter of fact, however, this was not in any sense a bankruptcy Act; for it does no more than make the company of Lombards in London liable for the debts of any other Lombard who quitted the country without paying his creditors. first Bankruptcy Act (b) is in fact to be found in the reign of Henry VIII., when it is to be feared that the

<sup>(</sup>a) 25 Edw. 3, c. 23.

<sup>(</sup>b) 34 & 35 Hen. 8, c. 4 (1542).

three kinds of costliness of which Coke speaks, namely, "costly buildings, costly diet, and costly apparel, accompanied with neglect of his trade and servants," were, as in later ages, the cause of most of the bankruptcies of the time.

By the Act of Henry VIII. the ordinary debtor was left to the tender mercies of the common law, for though it was a statute aimed solely against fraudulent bankrupts, it was, nevertheless, a real Bankruptcy Act, because the debtor's property was to be distributed among his creditors "rate and rate alike according to the quantity of their debts." Thus we have this noticeable feature in the statute that it left untouched the debtor simply unable from misfortune and extravagance to pay his debts, and applied only to that limited class of men who, in the archaic English of the Act, "craftily obtaining into their hands great substance of other men's goods, flee to parts unknown, or are not minded to pay or restore to any their creditors their debts and duties."

But as yet no special court was formed for bankruptcy purposes, and only a comparatively informal body, more or less equivalent to the Privy Council, was given what may be termed a jurisdiction in bankruptcy. To this body, consisting of the Lord Chancellor, the Lord Treasurer, the Chief Justices and other Privy Councillors, complaint was to be made by aggrieved creditors. But in the authority vested in this tribunal, if tribunal it may be called, the principles of bankruptcy law are apparent, less developed, it is true, than in more recent times, but still sufficiently defined for the purposes of identifi-

cation. On the other hand, the absence of an essential element of a true bankruptcy law is apparent, the freedom of the bankrupt from further liability after his creditors have received so much of their debts as the realization of the debtor's property will permit. But it would certainly have been astonishing if a bankruptcy law had found its way into the Statute Book in a fully developed state.

For thirty years this first Bankruptcy Act remained undisturbed, but in the reign of Elizabeth Parliament again took the subject in hand, and passed an Act (c) more elaborately formulating what were to be considered acts of bankruptcy, and limiting the scope of the statute to "any merchant or other person, using or exercising the Trade of Merchandize by way of Bargaining, Exchange, Rechange, Bartry, Chevisance, or otherwise, in Gross or by Retail, or seeking his or her Trade of Living by Buying and Selling "-a limitation which existed until the year 1861. But the Act of Elizabeth was perhaps more noticeable as the basis of subsequent bankruptcy procedure, rather than as an exposition of substantive law. For in it is to be discerned the beginning of the whole modern machinery of official assignees, trustees, commissioners, judges, and the rest of the army of officials by whom the State has from time to time endeavoured to protect creditors. At this period they were only modestly described as certain "wise and discreet persons," not necessarily creditors, to whom the management of the bankrupt's affairs was intrusted. So that if we

<sup>(</sup>c) 13 Eliz. c. 7 (1570).

take these two statutes together, bridging over in our minds the interval of thirty years between the Act of Henry and the Act of Elizabeth, which after all is but a trifling space of time in a period of more than three centuries, we may consider the basis of English bankruptcy law as having been established in the latter part of the sixteenth century. Because, broadly speaking, subsequent legislation has, in spite of variations in procedure and the trial of opposing systems, been aimed at the same object as these early statutes, and indeed has often been no more than the expansion of the same principles amidst great details and changed circumstances. This feature is obvious in the succeeding Act of James I. (d), which as that of Henry VIII. preceded the statute of Elizabeth by the space of thirty years, so in its turn succeeded it by the same space of time. For it did nothing more than make the powers of the commissioners more effective and amplify and explain the language of the previous statute for the purpose of preventing "deceitful" persons from evading its provisions. But in no way did it differ either in the principles of law or of procedure, from the Act of Elizabeth, which, combined with that of Henry VIII., forms the basis of English bankruptcy law.

But the reign of James I. did not close without adding another statute (e) to the law of bankruptcy, important rather in the development of the existing system of law than in the laying down of new principles. The cruelty

<sup>(</sup>d) 2 James 1, c. 15 (1604).

<sup>(</sup>e) 21 James 1, c. 19 (1623).

of the age is indeed exemplified by the provisions intended to prevent the non-disclosure by the bankrupt of his goods by means of the punishment of the pillory for two hours, added to the torture of the bankrupt of having one of his ears nailed to it and then cut off. But the most noticeable step in advance was the creation of the doctrine of reputed ownership which has probably given rise to more litigation than almost any other part of the law of bankruptcy from that day to this. formulated in almost the same words as have been followed in recent Bankruptcy Acts, since it was enacted that if any persons should become bankrupt and should at such time by the consent and permission of the true owner have "in their possession, order and disposition" any goods whereof they should be reputed owners, then that these articles were to be sold for the benefit of the creditors.

It is fitting to pause here in a view of English bank-ruptcy law, because with this statute closes the first series of legislative efforts to create a satisfactory law, nor had those efforts been on the whole unsuccessful, for the bank-ruptcy law of the seventeenth century was considerably in advance of the common law. It was small in compass, reasonably clear in substance, free from technicalities of procedure, neither based on nor interwoven with legal fictions, and though cruel, not more so than the temper of the times allowed, or than was natural having regard to the callousness with which human suffering was treated in that age. Nor when the improvements and changes which have taken place in other parts of our municipal law are noted can the law of bankruptcy be said to have improved

as time has gone on. It has grown large in compass and more complicated in detail. It was nearly a hundred years, however, before a further change took place, and when it occurred it was followed by others down to our own time in a rapid succession caused by the fact that the existing law has never fulfilled the intentions of the promoters or satisfied the nation at large.

The modern epoch—as it may be termed—begins with the reign of Queen Anne, for the two statutes (f), which then became law, contain one essential element of the modern law of bankruptcy, the principle that the debtor should be freed from the incubus of his liabilities, and also that his property should be distributed for the benefit of his creditors. For while the bankrupt was to be allowed a percentage on his assets, a certificate of conformity was to be granted him by the commissioners which should protect him against all past claims. In this we at once see evidence of a change of opinion, for a debtor might now be regarded as one who might be incapable of paying his debts through misfortune, and was not by the fact of his insolvency a criminal. This view is seen more clearly in the honest but clumsy attempt to be lenient towards those who had become bankrupt through unavoidable misfortune, and to be properly severe to reckless traders and gamblers. Those, for instance, who had lost 100l. within twelve months of their bankruptcy at cards or with games of dice were to obtain no benefit from the Act. The commencement of the modern epoch also is shown by the fact that in 1732 an attempt was made to consolidate the

<sup>(</sup>f) 4 Anne, c. 17; 5 Anne, c. 22.

bankruptcy laws of the two previous reigns (g), for a system of law must be at once elaborate and detailed when it is necessary to begin to consolidate it. But one archaic notion was still clung to with steadfastness—that the ordinary debtor should be left exposed to the harshness of the common law and that traders alone should have the benefit of the Bankruptcy Acts (h). It is hardly necessary to point out that this caused men to make continual attempts to evade the law so as to bring themselves within the definition of a trader, and thus fall within the more lenient operation of the law of bankruptcy. Another marked feature of this time was the difficulty of preventing creditors from exercising their absolute power of withholding certificates of conformity for reasons not having to do with the debtor's bankruptcy. This absolute power thus became a hardship on debtors, and a measure which was intended by the legislature as a means of protecting the genuine interests of creditors became neither more nor less than a means of oppression and an engine of extortion. Thus in 1805 no less than 940 commissions were issued, but only 405 certificates were granted. The sequel to the scandal was the appointment of the Commission of 1818, chiefly through the exertions of Sir Samuel Romilly, and, subsequently, the passing in 1825 of the Consolidation Act (i) of that year, the object of which was to limit the power of creditors to prevent

<sup>(</sup>g) 5 Geo. 2, c. 30.

<sup>(</sup>h) The Court for the relief of insolvent debtors was established in 1813 by 53 Geo. 3, c. 102, but it was simply a plan to release imprisoned debtors and distribute their estate without in any way freeing them from past liabilities. It would more accurately be described as a Court for the release of imprisoned debtors.

<sup>(</sup>i) 6 Geo. 4, c. 16.

the issue of certificates. It contained also sections which abrogated the punishment of death in the case of the concealment of property by a debtor, and substituted for this tremendous punishment the comparatively gentle one of seven years' penal servitude. But it was, perhaps, more remarkable as introducing one essentially modern element of bankruptcy law—the principle of compositions. This is not only sound in itself, but altogether in the interests of honest debtors and creditors, yet it has thrown more discredit on the law of bankruptcy in modern times, and been oftener the means of letting off rogues cheaply and of causing laxity in business dealings than almost any other part of the law of bankruptcy. In the early stage of the development of the principle, compositions with creditors were not so easy as they afterwards became; a majority of nine-tenths of the creditors was required to make them valid, and most of the steps of a proceeding in bankruptcy had to be gone through. The new system was thus rather a means of removing the discredit of being adjudicated a bankrupt, than of practical relief. But in tracing the development of the law of bankruptcy, the appearance of the beginnings of a new principle is more important than its practical results.

It was about this time that reforms began to obtain considerable parliamentary notice. Bentham had by his writings drawn attention to the subject, Brougham chose to throw his enormous energy in this direction, and practical politicians like Lord Althorp were found to help the legal reformers. One of the first results of this movement was the establishment of a separate Bankruptcy Court in 1832; its arrangements were far from perfect,

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and it received a good deal of scornful criticism from Bentham's pen. Still it was a marked step in advance.

We have seen that during the reigns of the four Georges the principle that the creditors should control the management of bankruptcies was in favour; but with that alternation of ideas which has characterised bankruptcy legislation in this country, a change came over the scene in 1842 (k), and it was enacted that the Court, and not the creditors, was to control the bankruptcy proceedings and to grant certificates. All that was left to the creditors of their former omnipotence was a veto on the grant of a certificate if they could show good cause why it should be withheld. We shall presently see that the pendulum swung back again in its old direction, and that there was little fixity of plan in the bankruptcy legislation of the reign of Queen Victoria. An Act of 1849 (1) continued the powers of the official assignee in the management of the bankrupt's estate, in conjunction with the assignee selected by their creditors. It not only did this, but it increased the facilities for compositions.

The most curious feature, however, of this piece of legislation was the transformation of bankruptcy officials into something approaching judges of morality. For a system of classified certificates was introduced, with a view to make the bankruptcy laws more efficacious by means of a series of mild moral rewards and punishments. It was truly astonishing that any man should have regarded such a system as of the smallest value. In a short time it was

<sup>(</sup>k) 5 & 6 Viet. c. 62.

<sup>(1) 12 &</sup>amp; 13 Vict. c. 106.

apparent that bankrupts cared absolutely nothing about the class they were in. So long as they received a certificate of discharge the practical end of the bankruptcy was gained, and whether they were in the highest or lowest class made no difference at all to the future prospects of a debtor. Moreover, officials must have been singularly critical and careful if they could with certainty state that a man had become a bankrupt wholly from, not wholly from, or not from unavoidable losses and misfortunes, which were the essentials for a certificate of the first, second or third class.

For twelve years this curious system was in existence; it was put an end to by the Bankruptcy Act of 1861 (m), which abolished graduated certificates, and substituted for them a simple order of discharge. This was one noteworthy effect of this Act. Another was the absorption of the Local Commissioners by the County Courts, which then became what they have remained ever since, local Courts of Bankruptcy. Worthy of remark as this fact is, it is secondary in importance to the abolition of the long existing distinction between traders and non-traders, and the consequent amalgamation of the Courts for the relief of insolvent debtors with the Bankruptcy Court. At the beginning of the century Bentham had inveighed vigorously against the continuance of an absurd anachronism, in support of which there was really nothing to be said, and which as has already been stated was the cause of constant attempts to transgress the law, and was simply a vestige of mediæval ideas which remained in existence longer than one would have thought possible.

After a short interval of eight years it was necessary to pass another Act (n), and amidst the many details of which it is full, a distinct principle is apparent, that the creditors were the persons most interested in the bankrupt's affairs, and that they were therefore primarily concerned in the management and in the distribution of The official assignee so long a prominent figure in bankruptcy proceedings disappeared, and the trustee appointed by the creditors became the active person, the Court having little more to do than register It was a necessary conthe decrees of the creditors. comitant of this system that compositions and liquidations by arrangement were expressly provided for and sanctioned by the Act, in regard to which the authority of the creditors was wholly uncontrolled by the Court. Nothing could be a greater contrast between the ideas formulated in this statute in regard to the controlling power in case of a person's bankruptcy, and those which are expressed in the Bankruptcy Acts of the earlier part of the reign; they are utterly opposed, and their very contrast shows the difficulty, if not the impossibility of passing a satisfactory bankruptcy law. Nothing can be clearer than the principles which should be the basis of a law of bankruptcy, experience, however, has shown that they are difficult of successful application. The Bankruptcy Act of 1883 (o) may be taken as a further proof of this proposition. Freedom of management by creditors being found unsatisfactory, the Board of Trade was called into requisition, and official receivers selected by the Board of Trade were appointed to act as trustees

<sup>(</sup>n) 32 & 33 Vict. c. 71.

<sup>(</sup>o) 46 & 47 Vict. c. 52.

of the property of the bankrupt until the appointment of a person by the creditors, or in default of his appointment. But the official receiver has likewise to make a report in regard to the conduct of the bankrupt, and in considering whether that discharge should be granted or refused or merely suspended for a time, the Court has to consider that report and the objections and views of the official receiver as placed orally before it. The official receiver has also necessarily to investigate the debtor's affairs and to report on any scheme of composition, which again must be sanctioned by the Court. Hence the principle of official management stands out prominently, as well as a kind of semimoral censorship in regard to the conduct of the bankrupt. The Act of 1883, in fact, carries us back a long way; it has revived the principles which underlay the graduated certificates of conformity, and the official control of the Act of 1842. The absorption of the Bankruptcy Court in the High Court of Justice is of less interest than the reappearance of these old familiar principles. In other respects there is not much which is noticeable in this last statute; details are different, but we have in this review of bankruptcy legislation in this country endeavoured to keep in view the principles and the prominent features of each succeeding piece of legislation. The statute book is a monument of good legislative intentions; these are never more conspicuous than in the many Bankruptcy Acts, the very number of which testifies to the fact that these intentions have year after year often produced little but disappointments.

There are indications, however, that at length some

finality has been attained, and that a working compromise between government control, which is, in effect, the assertion of moral theories, and the management of a debtor's assets by his creditors, which is pure business, has been reached. After a long series of attempts—characteristic of the adaptability of English law—the conflicting interests of the debtor and of the creditor, of commercial morality and of the realisation of assets, appear to be reconciled as far as is ever likely to be possible.

# CHAPTER IX.

### THE COMMERCIAL COURT.

TRIBUNALS of Commerce are well established in several European countries, but in England they have never been more than suggested. At the present time, however, something in the nature of a Tribunal of Commerce is to be found in the form of what is popularly called the Commercial Court, which, however, strictly speaking, is but one of the Courts of the King's Bench Division, in which what is termed the Commercial List of Causes is tried by a judge to whom this particular class of legal work is. assigned for a definite though short period, and who, contrary to the ordinary practice of the High Court, himself deals with all the preliminary interlocutory proceedings. This unsymmetrical arrangement is typical of English ways, but it is one which, as a phase in the growth of English procedure, is remarkably interestingand important. In effect it has resulted in the existenceof a special Court for the trial of a special class of legal Theoretically, there is no more reason why, for example, a merchant and a shipowner who have a dispute over a charter-party should have a particular Court set apart for the decision of their litigation, than two rival patentees who, however technical is the subject-matter of the disagreement, still have to take their place among ordinary litigants.

Yet after all this new tribunal is a return to mediæval procedure, for in seaport towns from very early times there were Port or Marine Courts, presided over by municipal officials who were assisted by merchants or mariners, for the trial of disputes relating to mercantile or maritime matters; and the Fair Courts and the Staple Courts had a similar jurisdiction in inland towns. These Courts long ago fell into abeyance, though in more modern times the sittings held at the Guildhall, in the City of London, for the trial of actions by jury, to some extent preserved ancient traditions. sittings were ended by the passing of the Judicature Act of 1873; the creation of a Commercial Court revived them to some degree, and was in principle a return to an even older system, of which the expeditious trial of commercial disputes in the place where they arose was the essential characteristic

Let us first of all see how this Court, as we shall now call it, came into existence.

The mercantile community is in many respects an organised body; it has not only its special organs of opinion in the press, it has its Chambers of Commerce and its representatives in Parliament, who can safeguard its interests. It has thus an actual and definite force, which cannot altogether be ignored. But it is doubtful if even this organised force would in itself have been sufficient to introduce a change in the judicial system which would meet the wants of men of business. Something in the nature of an accident must be regarded as the efficient cause of the creation of a Commercial Court. At the end

of 1892, Lord Gorell (then Mr. Justice Barnes) became a judge of the Probate, Divorce and Admiralty Division, on the appointment of Sir Francis Jeune to the place of President of the Division, left vacant by the death of Sir Charles Butt. The new judge was thoroughly acquainted with mercantile law, and was equally cognisant of the demands of the commercial community, whilst the President cordially agreed with any plans to increase the usefulness of the Division over which he presided. So in the course of 1893 it was made known that commercial causes arising out of disputes in some way connected with shipping, but in no sense purely Admiralty actions, would be entertained in the Admiralty Court at such times as the Court could spare from its special work. At once several actions were entered to decide points arising out of contracts of marine insurance. The number of commercial cases increased, and it became clear that if the judicial strength of the Division would have permitted it, the commercial community would have gladly resorted to it as a Commercial Court. It was obvious, however, that this was impossible without an addition to the number of judges attached to the Division, for two judges were only sufficient to cope with the regular flow of business, whether probate, divorce, or admiralty; the commercial work, with the existing strength of the Bench of the Division, could, therefore, only be dealt with in a fragmentary manner, and sometimes at the risk of dislocating the arrangements for the trial of admiralty actions. With the Queen's Bench Division fully equipped for work it was obviously impossible to place an additional judge at the service of the Admiralty Division, to do work proper for another Division, and for a time it appeared as if the mercantile body

would have to remain satisfied with the odd moments of the Admiralty judge. It was plainly, however, more than ridiculous that commercial men should be unable to have their legal business satisfactorily transacted by the Queen's Bench Division, to which it properly belonged; it would have shown a total incapacity to recognise a public demand had the lead given by the Admiralty Court not been followed. The result was that at the beginning of 1895 it was announced that commercial causes commenced in the Queen's Bench Division were assigned to Mr. Justice Mathew, not only for trial, but in order that he might have control over them from their commence-This was, as we have already pointed out, in reality the establishment of a Commercial Court. did Mr. Justice Mathew allow the opportunity thus given to him to re-establish the confidence of the mercantile community in the Common Law Courts of England to pass by. He disapproved of dilatory interlocutory proceedings, and by the exercise of sound common sense, and from a contempt for mere legal technicalities, he put an end to the interlocutory applications which in many cases caused so much expense and had so little effect on the result of the litigation.

The Court has continued on the same lines, though it has to some extent lost its early judicial individuality, and its scope has been enlarged. It is now a general Commercial Court instead of one which had jurisdiction over a limited class of cases arising out of shipping and insurance contracts. Finally, it must be regarded as fixed in English procedure—a remarkable instance of the haphazard and yet on the whole effective manner in which legal changes have occurred in this country in all times.

It is worth while, however, to take note of this Court from another point of view—as emphasising a change which has occurred in procedure in the last fifty years. The Commercial Court is the most emphatic illustration which can be given of what may be called business procedure as distinguished from legal procedure—of the desire of the judiciary that litigation should be as little technical as possible. There are still some useless technicalities visible, not comparable, however, to those which were to be seen before the Common Law Procedure Act of 1854, and the Judicature Act of 1873, and several other modern measures. The changes introduced in the Commercial Court would startle a practitioner under the old régime (a); pleadings are not necessary, points of claim and defence being frequently ordered in place of formal claims and defences, documents which are not strictly proved are admitted in evidence, as are written statements containing hearsay matter. These and other details emphasise a popular revolt against legal technicality, and a desire to have disputes settled quickly and without formalities. The Commercial Court, in fact, responds to popular opinion, and it marks the culminating point of the reaction against technicality in procedure which has been visible for more than half a century, and the first step of which in regard to the Common Law Courts was the passing of the Common Law Procedure Act, 1854. It has influenced the procedure of other

<sup>(</sup>n) In the case of Biddell v. Clemens, Hirst & Co. (27 T. L. R. p. 47), Mr. Justice Hamilton decided a case on his personal knowledge of the meaning of a mercantile term. This decision was reversed by the Court of Appeal, on the ground that a commercial custom must be proved as a fact by evidence.

Courts, for what is right in one Court cannot primâ facie be wrong in another, and thus a general tendency has grown up to conduct litigation with as little formality Rules of procedure too strictly construed as possible. may be a constant menace to justice; construed reasonably, they make it proceed decently and in order. Such is the object of modern English procedure. The judicial point of view in the last quarter of a century, more especially since the creation of a Commercial Court, has in fact diametrically changed, and the Judicature Rules, voluminous though they are, being capable of alteration at any time, have lent themselves to this new movement, for they can be amended so as to prevent undue technicality whenever a necessity for so doing is proved. We have thus reached a period in English legal history, when procedure is on the whole no more than sufficient to enable litigation to be conducted on well-ascertained lines, and is subordinate to the redress of private wrongs. That there are improvements in existing procedure is not to be denied, but the Commercial Court, with its "short cuts" and absence of technicalities, is always at hand a constant object lesson of the advantages of common sense and rapidity in litigation, and a remarkable illustration of the trend of the direction of public opinion since the year 1873 in regard to legal procedure. As a reversion to a system which flourished in mediæval times, it is of peculiar interest to the student of the history of English law.

# CHAPTER X.

THE VICTORIAN LORD CHANCELLORS, AND THEIR INFLUENCE ON ENGLISH LAW.

THE lives of the eminent men who filled the high office of Lord Chancellor of England during the reign of Queen Victoria are remarkably illustrative of the trend of the English legal system, and of its personal characteristics, during a period which is now a well-defined historical epoch. The Victorian age has so many distinctly marked attributes extending over many years that it is now obviously a definite period, coinciding with the rule of a single sovereign. The lawyers who occupied the Woolsack during the reign of Queen Victoria differed remarkably in personal character, in mental qualities, and in legal attributes; but these differences help to create a complete picture alike of the lawyers of the age and of the system under which they flourished. From the point of view of the legal historian, it is important to form some estimate of the influence of this group of judges and statesmen—the heads of the English iudiciary—on law and procedure during this long space of time.

This period, so far as concerns the office of Lord Chancellor, was to some extent one of transition. In England

changes proceed so gradually that one is apt to overlook the effect of a slow transition; it is clear, however, that the office of Lord Chancellor is now less judicial and more administrative in its nature than it was at the beginning of the reign of Victoria. The holder now fulfils more political and fewer judicial duties. Lord Cottenham during the last tenure of his Chancellorship "devoted his time almost entirely to judicial work, seldom appearing in the Cabinet." To-day a Chancellor who found his strength insufficient for judicial and political work would regard himself as bound to devote such vigour as he possessed to the service of the House of Lords in debate, and to the assistance of his colleagues in Council. The difference in the strain of political and administrative work in the last and present centuries is made more clear when we bear in mind that the Chancellor was not only a member of the House of Lords, and as such a member of the highest Court of Appeal, but that he was also an equity judge of first instance and a judge of appeal from the Vice-Chancellors. He had therefore at the beginning of the period to fulfil three judicial functions. Those of a judge of first instance were considerably lightened when in 1842 two additional Vice-Chancellors, as the Chancerv judges were called, were appointed during the last Chancellorship of Lyndhurst. But though the Lord Chancellor was then relieved to some extent of one part of his work for the disappearance of the Chancellor as a judge of first instance was gradual—this increase in the number of primary Chancery judges at the same time increased his duties as a judge of appeal, and rendered sooner or later a new appellate tribunal inevitable. This body came into being under the Chancellorship of Lord Truro in 1851.

Two new judges were created, who were styled Lords Justices of Appeal, and though the Chancellor from time to time sat in this Court, it gradually came to see little of his presence. Rolfe, afterwards Lord Cranworth, and Knight Bruce were the two first Lords Justices, and the former, two years later, became Chancellor on the formation of Lord Aberdeen's Government in 1852. Probably from his interest in the new Court, Cranworth, though he was not an experienced equity lawyer, continued to attend its sittings, and thus gave an opportunity for one of Bethell's mordant remarks: "I wonder," someone said to him, "why old Cranny always sits with the Lords Justices." "I take it to arise from a childish indisposition to be left in the dark," was the characteristic reply. Bethell's criticisms on his contemporaries are tempting incidents to dwell on in Victorian legal history; but our object at this point is to show, briefly, the manner in which the office of Lord Chancellor has changed during the years of the late reign.

We have seen the Chancellor ceasing to be a judge of first instance, then an intermediate judge of appeal. And when in 1876 two judges, known as Lords of Appeal in Ordinary, were added to the House of Lords so as to strengthen it as the final appellate tribunal, the importance of the office of Lord Chancellor as a final judge of appeal was noticeably lessened. In that Court a high legal capacity, whether in a Chancellor or in a Law Lord, necessarily gives an individual judicial supremacy. When Lord Westbury as Chancellor had for his colleagues Lords Chelmsford, Cranworth, and St. Leonards, his was obviously the master-mind. But the constant presence of

judges who have always devoted their minds mainly to the study and exposition of the law, and who have leisure to consider cases out of court, necessarily tends to diminish the weight of the judicial utterances of a hard-worked statesman who is also the president of the tribunal. More than half a century ago Lord Langdale proposed that the judicial and administrative functions of the Chancellor should be separated, and that the political functions "should be discharged by a Keeper of the Great Seal, who was to hold no judicial office, but was to act as a Minister of Law and Justice." The change, which Lord Langdale would have effected by legislation, has to a large extent come to pass by force of circumstances. Human capacity has definite limits, and so at the present time the Lord Chancellor, with his multifarious duties, occupies to some extent the position of the Keeper of the Great Seal under Lord Langdale's scheme. The Master of the Rolls, as Lord Langdale then was, saw some way into the future; but his scheme is now chiefly of historical importance, because it indicates that some clear-sighted minds perceived the inevitable tendency of events—the changes which have since occurred in the nature of the office of Lord Chancellor. Be this as it may, they have come to pass contemporaneously with the increase in the official and political work of the Attorney- and of the Solicitor-General, so that at the present time all these three offices have become more administrative and less legal. To some extent this has had an undesirable and unforeseen effect, for in consequence the judicial bench, which owing to various causes is increased in size and is a somewhat unwieldy body, has become more independent of a central control at the very time when, owing to the fact that it

forms part of one Supreme Court, it is desirable that it should be governed by a Chancellor who is at once in close touch with public requirements and with the legal profession.

Though the head of the legal system and responsible for its efficient working, the Chancellor has always held a curious and an anomalous position, which has emerged and taken shape almost imperceptibly. Though responsible, he has never had a free hand, and the mingled fortunes of legal and political life, and the urgencies of political necessitics have affected the personal equation in unexpected ways. Men possessed of opposite qualities, of divergent aims and ideals, have succeeded one another as the political system has brought one party up and another down; so that it is not surprising that though the Lord Chancellor has ever been the most prominent legal personage in the public eye, his influence on the body and system of English law has not equalled his public authority, and that that influence has been exercised spasmodically and irregularly.

If we take the period 1858—1868, from the commencement of Lord Derby's second Administration to the end of his third term of power, the interval being filled by the Premierships of Palmerston and Russell, we see the Woolsack occupied by Chelmsford, Campbell, Westbury, Cranworth, and for a second period by Chelmsford. Chelmsford was an able Common Law advocate, whose tact, common-sense, and agreeable manners allowed him to fill any place which was offered to him without discredit, but also without distinction. Campbell was a

thorough all-round lawyer, whose robust brain and strong body enabled him to overcome difficulties and to be a thoroughly efficient advocate and judge. He was essentially the business lawyer-hard-headed, keen-sighted, and laborious, with the qualities which would have made an efficient railway manager or a capable archbishop. Westbury differed toto calo from his two predecessors. A scholar and a jurist, his keen, clear intellect saw through mazes of fact; points of law sank to their proper dimensions before his grasp of legal principles; and he had the ardour of the clear mind for system, and therefore for legal codes. This desire for system is the basis of the desire for codification, and causes also the dislike of prolixity and obscurity, which is the vice of judge-made law. If he had lived in a bureaucratic country and had been Minister for Justice, Westbury would have left behind him monuments in the form of codes. It would not be easy to find a sharper contrast to him than Cranworth, one of those men whose careers form models for English youth, who succeeded him on his fall, and who had already occupied the Woolsack in the Governments of Aberdeen and Palmerston. The story runs that when he took the place of Westbury, some one said of, we may suppose, rather than to him: "Well, Kingsley is right; it is better to be good than to be clever." Cranworth was essentially a safe man; he was well versed in judicial decisions, so that he was guided by an abundant number of legal signposts; his temperate character prevented him from mistakes of conduct, and his kindly nature made him a universal friend. It was impossible not to congratulate him on his several successes; yet he became a puisne judge because he had so little private practice that if he had

ceased to be Solicitor-General he would have lived a life of enforced leisure, and he became Chancellor because he had been Solicitor-General, and because for the moment no lawyer of high calibre was available. Yet he was a dignified and a sensible Chancellor, who would never have made the fatal mistakes of administration which caused the downfall of his infinitely abler predecessor; and he even carried some useful legal reforms in the true English fashion. Indeed, the comparatively small personal influence of the Chancellor is strikingly illustrated by the careers of Cranworth and Westbury; for the latter had not only, as we have pointed out, the type of mind which appreciates the importance of legal reforms, but also a lifelong and unquenchable wish to effect changes which he regarded as necessary. A scientific education for lawyers is the corner-stone of a clear legal system. 1846, when overwhelmed by an enormous practice, Bethell, as he then was, brought forward the subject in a letter to the Master of the Rolls. And he also "unfolded the details of his scheme in a letter addressed to the Treasurer of the Inner Temple. He advocated founding four chairs for readers or lecturers on the subjects of real property law and conveyancing, constitutional and criminal law, personal property and commercial law, and equity as administered by the Court of Chancery, the compulsory attendance of all students at the lectures on real property law, as being of universal utility and necessity in all branches of the profession, and a compulsory examination with competition for honours and exhibitions. part of his plan that these readers should devote themselves not only to their separate duties, but to the general and public purpose of amending, improving, and digesting the law" (a). Bethell's own Inn, the Middle Temple, appointed a lecturer in jurisprudence and civil law; but it was long before the present more systematic but still imperfect measure of legal education was established. Again, in 1854, Bethell-he was then Solicitor-General -in a debate on the work of the Inns of Court, "expresses his desire to see the Inns of Court erected into one great legal university, not only for the instruction of law students, but for the purpose of co-operating with the other universities in the education of the public at large. He contrasted the unfavourable position we then occupied with that of France, where the study of the law was systematically pursued, and lamented the want of instruction in original principles which was characteristic of English jurisconsults." This orderly and clear legal education was, in Bethell's opinion, necessary not only from the point of view of the practising lawyer, but also "because by the institutions of the country the people are invited to take a part in the administration of the law; and it is our bounden duty therefore to provide them with the means by which they may become qualified to do so, by obtaining a general knowledge of the principles of the law." This idea of a great legal university in the Metropolis of England, based on the ancient Inns of Court, to which students not only from the Mother Country but from the dominions beyond the seas should resort, and where the legal training should be of the highest kind, is a noble project and of the first import-Writing in 1867 to the late Mr. Henry Reeve, Lord Westbury, referring to this plan, stated that his-

<sup>(</sup>a) Nash, Life of Westbury, Vol. I. p. 93.

proposal had in 1847 received no support; and then he added regretfully but optimistically, "It must be the work of the next generation." More than one generation of lawyers has passed away since these words were written, and a plan which is in the highest sense imperial seems to be as distant as when Lord Westbury was alive (b).

This has been something of a digression, but Lord Westbury's unvarying views on the necessity of a firstrate education in legal principles is illustrative of his trend of mind, and at the same time of the personal impotence of a Chancellor to carry out his views. was still more clearly exemplified in the case of law The Bankruptcy Bill, which, as Attorney-General, he had piloted through the Commons, he was, as Chancellor, unable to carry in the Lords without compromises, which, he said, reduced its utility in the same degree as if a watch had been deprived of its mainspring. This illustration was given in a moment of irritation, but unquestionably the Bill was too much modified. Westbury also succeeded in passing a Registration of Title Act, which being, against his wish, non-compulsory, was almost a dead letter. In fact, far from being the successful author of a code even of any part of the case law of the country, or from establishing a Department of Justice. Westbury had to be satisfied with passing a modest Statute Law Revision Act, which covered the period from Magna Charta to the Revolution. Even this particular piece of legislation was no more than a sequel to that initiated by Lord Campbell, who passed a similar Act dealing with the period 1770-1858.

<sup>(</sup>b) See post, p. 246.

The introduction of this Bill gave Lord Westbury an opportunity of stating his opinions on and desires for the codification of the case and statute law of England in a speech which has been regarded as the most successful he ever made in Parliament. "He sketched the outlines of a scheme of revision of the case law," and "he proposed to get rid of enactments which were no longer in force, and to classify the remainder under proper heads." But while this address remains a monument of Lord Westbury's large and scientific legal views-views, be it remembered, not of a professor, but of a man who was one of the most powerful advocates who ever practised at the English Bar-it also continues to be a melancholy reminder of the powerlessness of a Chancellor to carry reforms which are theoretically desirable, but which are not supported by the necessary weight of a public opinion.

A most important measure of law reform was passed in 1852. The Common Law Procedure Act of that year was the beginning of a new era in Common Law procedure; it modernised the whole system and brought the practice into line with current ideas; and the Acts which abolished the Masters in Chancery and altered the procedure in the Chancery Courts were primarily intended to prevent the delays for which they were notorious. But these and other contemporaneous improvements were the result of popular pressure. The country, said Lord Lyndhurst, when Lord Derby's Government came into office in the spring of 1852, was looking for law reform "with eager and intense interest." And Lord St. Leonards asserted that "the cause of law reform was supported by the general opinion out-of-doors." When the country

has made up its mind that some law reform is required, a measure must be passed. But as to the details of it, the people are naturally careless. A Court of Criminal Appeal would never have been established by Lord Loreburn in 1907 had there not been, in Lord St. Leonards' homely words, sufficient public opinion "out-of-doors" to enable the Chancellor to pass the necessary legislation. For legal symmetry, or other legal ideals, the country cares not a jot. Public opinion demanded this particular measure as a safeguard for individual liberty, and a new Court was created. A more remarkable example is to be found in the system of County Courts, which dates from the year 1846, and which is unquestionably one of the most beneficial fruits of the legal reforms of the reign of Queen Victoria. For years before this date there had been a popular demand for courts in which the small litigation of the country could be conducted. mand formed the reason for Brougham's Local Judicature Bill of 1833, which was mercilessly destroyed by Lyndhurst, by whom, by a strange irony, the County Court Act of 1846 was passed. If any Chancellor was the author of this reformation, to Brougham may be allotted the credit, though the Act was the Act of Lyndhurst, and Cranworth set it working. It is thus to public demands rather than to legal ideals that a Chancellor has to look who would make changes in the English legal system, and the novels of a Dickens may therefore be productive of more result than the addresses of a Westbury.

It thus came to pass that in the decade which, for the moment, we are considering, the Chancellor who unquestionably had the temperament and the intellect of a law reformer has left no larger results than were achieved by men who passed useful and modest measures of reform, which it was obvious were peremptorily demanded by public opinion. It is the penalty of democratic Government that measures, however desirable, such as those which Lord Westbury conceived, cannot be passed through a popular assembly or a Conservative upper chamber merely on their own intrinsic merits. They are jostled and put aside for matters which evoke more public interest, or which rouse less acutely professional alarm.

It is obvious that, from the point of view of the influence of the Chancellors as legislators on English law, Lord Selborne was more important than Lord Westbury, for Lord Selborne passed the Judicature Act of 1873, which for good or evil was the most noticeable work of any Chancellor during the reign of Queen Victoria. have put an end to the lamentable conflict between the systems of Common Law and Equity, to have ended for ever the almost personal antagonism between the two sets of courts, to have improved the procedure of the Chancery Courts in trials of matters of fact, and to have lessened the technicality of Common Law procedure would in itself have been a memorable work. But the amalgamation into one Supreme Court of all the several independent jurisdictions, primary and appellate, excepting that of the House of Lords and of the Privy Council, was, when we remember that the existing courts were the results of the legal evolution of many centuries, an extraordinary achievement. Yet in the result it has been proved that symmetry, however desirable, may not have the practical usefulness of systems which, anomalous as they may seem,

have been gradually evolved and are suitable to the country. The absorption of the then Common Law Courts has often been discussed; it is sufficient here to quote and endorse words of the latest biographer of the Chancellors:

"The amalgamation of the Exchequer and the Common Pleas with the Court of Queen's Bench was a sacrifice to the goddess of symmetry, the wisdom of which may reasonably be questioned. The three old courts with their three chiefs, each at the head of his band of puisnes, had much to commend them besides their antiquity. Their rivalry, their esprit de corps, and the sense of responsibility which is now distributed among the sixteen judges of the King's Bench Division, did much to maintain the high level of the Common Law Bench, which was never higher than in the 'sixties' and 'seventies'" (c).

A single Supreme Court presupposes a single responsible head. The expression, "the enthroning of the Chancellor on the necks of all of us," which the late Lord Coleridge used in writing to Lord Lindley, while it contains some germs of truth, was and is incorrect, because the office of Lord Chief Justice creates to some extent, as regards the Common Law Divisions, a dual responsibility. Yet that of the Lord Chief Justice of England, who appears to the public eye to be supreme in his own Division, is anomalous, for he shares the work of the puisne judges, and he has not that personal authority which was possessed by the chiefs of the old Common Law Courts.

<sup>(</sup>c) The Victorian Chancellors, by J. B. Atlay, Vol. II. p. 417.

If Lord Selborne has left his mark on the procedure of the country, he and Lord Cairns will long be remembered for their influence on its jurisprudence. The Vendor and Purchaser Act of 1874 may be placed entirely to the credit of Lord Cairns, the Conveyancing Acts of 1881 and 1882, the Married Women's Property Act of 1882, and the Settled Land Act of 1882 must be regarded as the joint work of these two eminent lawyers, for if these latter statutes were conceived by Lord Cairns, they were carried into law by his successor. It is, therefore, not altogether unreasonable to regard Lord Selborne as the Chancellor who, during the reign of Queen Victoria, had the most personal influence as a legislator upon English law. To apportion actual merit and the several services of the Chancellors when, to some extent at rate, more than one personality has conduced to a reform, may tend to mislead, and to give false views of legal history. Yet, in any estimation of the Victorian Chancellors, it is of the highest interest to endeavour to ascertain the effect of the several personalities on English law, in the first place as legislators, in the second as judges, otherwise the story of their lives differs little from that of other eminent public servants, and the value of their careers is unassessed.

It has already been said that judicially the influence of the Lord Chancellor has under the force of circumstances steadily decreased. This is especially marked in the extent of judicial decisions. Lord Truro, for example, was Chancellor only for a year and seven months (1850-52), yet one hundred and thirty of his decisions are preserved, and fill two substantial volumes in the Chancery

Reports. On the other hand, during two years of Lord Halsbury's tenure of the Woolsack he gave judgementduring the years 1903 and 1904—in fifty-four appeals in the House of Lords, but in conjunction with other members of that tribunal. So that the judicial and individual influence of these judgements is not so great as if they had been delivered by a single judge. The influence of a judge on the body of English law is to some extent a question of time as well as of individual power. Stowell and Lord Mansfield are memorable as judges, not only in consequence of the breadth and clearness of their judgements, but also because each was fortunate in the period during which he was a judge. Lord Stowell was partly able to mould the law of the Prize and of the Admiralty Courts because before his time judicial decisions in them had not been formally reported, and because he occupied the office of judge High Court of Admiralty at a time of great maritime war and of a notable increase maritime commerce. Lord Mansfield had also the opportunity of laying to a considerable extent the foundations of modern commercial law. Other names will not be forgotten-those of Willes, Blackburn, and Esher, in whose time much of the later body of commercial law was established, and on it these three judges have left their mark. But the tenure of office of the Chancellors is not sufficiently long to allow a moulding effect to be produced, and their individual influence on English law cannot therefore be considerable, even when the mental character and training of a Chancellor had been such as to give his judgements the breadth and the vivid expression of elemental principles as applied to concrete facts, which alone enables them to have the distinction and guiding power to become landmarks in jurisprudence. Thus, numerous as were Lord Truro's decisions as a judge of appeal both from the decisions of the Vice-Chancellors and of the Masters of the Rolls, they are largely concerned with purely technical matters which are of little value beyond the immediate case in which they are raised. Lord Truro was a sound lawyer, though somewhat narrow in his outlook; in early life he had been an attorney much versed in the technicalities of his profession, so that he was without the training conducive to that habit of mind which seizes the opportunity to lay down in a luminous manner interesting principles of law, and to give apt illustrations of their applicability to modern social and commercial con-In 1851—we take these cases almost at random as two illustrations of the failure to seize judicial opportunities-Lord Truro had to decide whether the Attorney-General, acting on behalf of the public, could file an information to restrain the group of undertakings which is now the Great Western Railway Company from opening what may be called their main line, until the branch to Stratford-on-Avon, for which parliamentary powers had been obtained, had been constructed. An important question -almost national in its far-reaching consequences-was here raised. Lord Truro was, however, content to deal with it in a judgment which occupies but a single page of the report. He was satisfied to state that he could not extract from "the information" any grounds to warrant the exercise of the jurisdiction of the court. In another case an opportunity occurred of delivering a judgement of large social importance, which by means of a lucid statement of principles might have been a guide in many succeeding circumstances. The Chancellor set aside a family compromise as having been fraudulently obtained. "I shall content myself," he said, "with stating the principle of law upon which my decision is founded and name two or three cases of, I conceive, undoubted authority in which the principle is recognised and acted upon. That principle is that to render a family compromise binding there must be an honest disclosure by each party to the other of all material facts known to them relative to the rights and title of each as are calculated to affect the judgement in the adoption of the compromise." Then Lord Truro cited four decisions which he regarded as establishing his statement of law. This decision, doubtless, effectually concluded the pending litigation, but it is so brief as to be of little use in regard to future cases.

In striking contrast to these judgements of Lord Truro are those delivered by Lord Westbury. It was only lack of opportunity which prevented him from being memorable as a judge. He possessed in a remarkable degree a large outlook and a grasp of main essentials, as well as a power of clear and pointed expression which has only been approached since by the late Lord Bowen, who had the same love of precision and the same fastidious literary judgement. Four years is no long period in legal history, and it was impossible in that time for Lord Westbury to affect the growth of English law to any large extent, however peculiarly well suited to that end. same hindrance is observable in the case of Lord Cairns. During the short Administration of Mr. Disraeli in 1868, he had little opportunity for the further developement of the judicial qualities which he had shown as a Lord Justice of Appeal. But the six years of Mr. Disraeli's second Government, 1874-1880, gave Lord Cairns an opportunity of showing remarkable power as a judge, though the time was too short for its influence to be fully felt. Those judges who have in some degree moulded English law have had placed before them the same branch of law To this cause eminent menfor a considerable period. Stowell, Mansfield, Willes, Blackburn, and Esher, and to these names may be added Cresswell and Penzance-in no small degree owe the historical position which they now occupy. Lord Esher (Brett), for example, during a long judicial career, had to decide a large number of commer-Early, experience and some predilection for cial cases. this branch of law gave him a special aptitude for dealing with it, which, though he had not otherwise distinguishing judicial characteristics, has enabled him to take a place among those who have individually affected the body of English law.

The judgements of Lord Cairns are remarkable for the ease with which long and complicated facts are marshalled into a comparatively short and almost an agreeable as well as lucid narrative, so that principles of law appear to emerge from them ready for solution. Legal principles enunciated with simplicity and with an absence of judicial affectation become extraordinarily clear, and the whole series of judgements thus constitute balanced masterpieces of judicial reasoning. But in spite of qualities which in the opinion of many cause Cairns to rank as the most eminent of the Victorian judges and Chancellors, he has, as has been said, failed to impress himself on British jurisprudence, even though judicially and personally he may be regarded as the first of the Victorian Chancellors.

To Lord Westbury's power of testing cases by means. of ground principles, Cairns added the judicial gifts of self-restraint and patience and a capacity for precise reasoning and a quick insight, and was less unwilling than Lord Westbury to give weight to judicial precedents. Of his judgements it has been said that "they went straight to the vital principles on which the question turned, stated these in the most luminous way, and applied them with unerring exactitude to the particular facts. It is as a storehouse of fundamental doctrines that his judge-They disclose less knowledge of ments are so valuable. case-law than do those of some other judges; but Cairns was not one of the men who love cases for their own sake. and he never cared to draw upon, still less to display, more learning than was needed for the matter in hand. It was in the grasp of the principles involved, in the breadth of view which enabled him to see these principles in their relation to one another, in the precision of the logic which drew conclusions from the principles, in the perfectly lucid language in which the principles were expounded and applied, that his strength lay " (d).

It is undesirable to apportion with nicety judicial merit under the singularly varying circumstances of the several Chancellorships, but the testimony of competent critics appears to give Lord Cairns the first place as a judge among the Chancellors of the reign of Queen Victoria. He had, in addition to other qualities, one supreme merit as a judge, that of silence. A story is related of him which deserves to be remembered in every court in the

<sup>(</sup>d) Bryce, Studies in Contemporary Biography, p. 184.

land: "Lord Blackburn, one of the first Lords of Appeal under the Judicature Act, had acquired in the Queen's Bench a habit of interfering with the arguments of counsel by difficult questions in a harsh voice, which few who once heard it will ever forget. His first effort in this direction was checked, before an answer could be given, by a stern remark from the Woolsack, 'I think the House is desirous of hearing the arguments of counsel, and not of putting questions to him.'"

To listen without interruption to the arguments of counsel is a rule now often more honoured in the breach than in the observance, though it is one which should be strictly observed, especially in cases of an appellate kind, since the constant interrogation of counsel by the Bench not only delays the progress of a cause, but detracts in no small degree from the dignity of the court.

It was said at the commencement of this chapter that the careers of the Victorian Chancellors formed a striking picture of the lawyers of the age. Men of the most opposite gifts, qualities, and tastes, born in different circumstances, trained under varying systems, have become Chancellors. But though to some extent, and on some occasions, the holders of this high office have been indebted to a kind fortune, it is unquestionable that no man has attained it without remarkable qualities, and in every case the Woolsack has been the reward of unremitting labour and patience, and of the exercise of considerable mental powers. If Lord James of Hereford had been willing to accept the Home Rule policy of Mr. Gladstone, Lord Herschell might never have attained the

Woolsack; and if Lord Selborne had acquiesced in Mr. Gladstone's attack on the Irish Church, Sir Page Wood would never have become Lord Chancellor Hatherley. But no one would dream of regarding either Hatherley or Herschell as unfitted for the post to which a combination of circumstances and personal qualities carried them. Lord Herschell was barely fifty years of age when he attained office, and he would never have been, to use a popular phrase, "in the running," had he not shown unusual capacity both as a lawyer and a politician. Lord Hatherley, on the other hand, was approaching seventy when, much to his surprise, Mr. Gladstone offered him the seals, but he would never have received them had he not. in addition to the political virtue of being a sound Liberal, added to it the qualification of being admittedly an equally sound lawyer and a painstaking judge. word, the several careers of the Victorian Chancellors prove that there is no special road to the Woolsack. Natural ability cultivated very highly in a particular profession, united with power of expression, and unusual capacity for work added to an adaptability for politics, are the main features of these various lives. So long as mind and will were concentrated on the practice of the law, no hereditary gifts, no special early training were requisite. Indeed, the difference in these respects is noteworthy. If we take-by way of example-four Chancellors: St. Leonards, Cranworth, Chelmsford, and Westbury, we find that the first was the son of a barber, the second of a clergyman, the third of a merchant, and the fourth of a doctor. The first seems to have had the slight and unsystematic education which was usual at the end of the eighteenth century, to have become a clerk in a solicitor's office, and in that capacity to have attracted the attention of Mr. Duval, a well-known barrister, who took him as a pupil without a fee. Cranworth followed, as might be expected, a more normal course. From the Grammar School of Bury St. Edmunds he proceeded to Trinity College, Cambridge, and thence to the Bar. Chelmsford had a curious early career. Educated, if one may use the phrase, for the navy, with a short experience, yet he found himself in the West Indies, and having decided to become a member of the Bar in St. Vincent, he came to England to qualify himself for his future profession. When reading in the Temple he was persuaded by his master to relinquish the idea of a colonial life, and become a barrister in England.

The last of the four men whose careers for the moment we are noting was educated at home, and then sent at the early age of fourteen to Wadham College, Oxford, and when called to the Bar he was only twenty-three. would be interesting, if it were possible, to ascertain the actual quality which assured to each one of these men professional success. Lord St. Leonards at the very outset of his career published the now classical treatise on the law of vendors and purchasers. Lord Bowen once said that to write a law-book was to produce a work which redounded in time little to the credit of the author, because it was constantly being altered by changes in the law. But as the years advance the name of Lord St. Leonards will remain fixed and noteworthy in legal annals as an author as well as a judge. Other jurists have written books and have not become Lord Chancellors, and other lawyers have had intellects as clear as Westbury's, and have had but

little of his professional success. A considerable combination of qualities united in a single personality may, however, be noted. Every Chancellor has been a lawyer of some eminence, an advocate of fair capacity, confident in himself and thus giving confidence to his clients. Common sense and insight into men and their motives, so that the knowledge of law should be capable of application to the business of the world, have also been necessary adjuncts. How little, indeed, of the academic temperament there is in the English lawyer, how entirely unprofessorial he is, is well exemplified by the careers which we are now surveying. The salient qualities of the Englishman of the eighteenth century, his common sense, his clear view of an objective, and his absence of imagination seem to be perceptible in all these eminent persons. In other words, they were typically English, they suited the English taste, as shown by that essentially English person, the solicitor with a practice. Perhaps Westbury was the most academically-minded of the group, and it was his absence of common sense which caused his downfall; indeed, a man less abnormally brilliant would never have had that want of the perception of the ordinary man's mind which Westbury constantly showed in his biting sarcasms. An intellectual arrogance had gained the mastery over him, which showed itself on the smallest provocation. "Mr. Rolt, we must be careful how we make our quotations in the presence of that distinguished scholar, Mr. Bethell," said Lord Justice Knight Bruce on one occasion, as he and Rolt were quoting passages against each other. "I beg your lordship's pardon," said Bethell, looking up, "I thought my learned friend and yourself were quoting from some Welsh author." But among the Victorian Chancellors Westbury was unquestionably preeminent for mental grasp and range, for a vivid interest in any subject which came within limit of his mind, and for his classical cultivation (e).

Our legal education may be unscientific, our jurisprudence informal, but nothing, as these careers indicate, can detract from the fact that the English Bench is as a whole the most meritorious in the world, because even in the case of the Chancellor, who must be a politician and must belong to the party in power, in every instance during the reign of the late Queen Victoria the lawyer who has been chosen by the Prime Minister for the time being for the office has arrived at the position which, by common consent alone, makes him eligible, by his individual exertions and by his intellectual capacity.

As a politician the Chancellor is but one among several members of a Cabinet, each of whom, even if, as happens to-day, there are among them men who have practised at the Bar, is primarily a politician. A Chancellor who can be pre-eminent as a statesman and a debater must be of

<sup>(</sup>c) A popular historian in commenting on the death of Lord Westbury has called him a "failure," and rhetorically pronounced "the close of his career but a heap of ruins." (M'Carthy, History of Our Own Times, Vol. IV. pp. 378, 379.) This statement is an absurd exaggeration. Westbury, after a brilliant professional career, was Chancellor for several years. He left office under Parliamentary censure on a comparatively small administrative mistake, and he subsequently served with distinction as a judge both in the House of Lords and the Privy Council, and was strongly urged by Mr. Gladstone to accept the office of a Lord Justice of Appeal. It was generally recognised that his administrative error was caused by good-natured carelessness. Westbury's loss of office is chiefly remarkable as an example of the cleanliness of English official life—a small mistake cut short his official career.

abnormal capacity. To be a useful politician and a capable lawyer—Lord Halsbury, for example, well answers this description—is not enough to cause a Lord Chancellor to be singled out for particular commemoration. Looking back over the lives of those who occupied the Woolsack during the reign of Queen Victoria, two names only seem to satisfy the test which enables us to rank them as statesmen of weight and influence, those of Lyndhurst and Cairns. The influence of the former in the House of Lords was remarkable; in 1832 he nearly destroyed the great Reform Bill. His power arose from the fact that he was not only an orator and a debater, but also united large general knowledge to much worldly shrewdness.

"Lyndhurst," says his last biographer, "possessed an extensive and accurate store of knowledge on the minutiæof the Eastern question, and on the history of Austria and Five years later, when in his eighty-eighth Prussia. year, he took the opportunity, on July 5, 1859, of calling attention to the state of our national defences. It was the year of Solferino and Magenta, and its later months. were marked by that extraordinary ebullition of Anglophobia on the part of the French colonels which evoked the Volunteer movement on this side of the Channel. July there was no open sign of ill-feeling between the two nations, but Lyndhurst pointed out how vastly the invention of steam and the improvements of internal communications had increased the striking power of our old rival, as illustrated by her rapid mobilisation and triumphant campaign on the Mincio, and he proceeded to state to the House the measures which he deemed necessary for the safety of the country. Into these details we need

not follow him further than to notice that he was emphatic in his insistence upon what is known as the 'two-Power standard' recently raised by official acknowledgement to 'two Powers and a margin.' If we wish to be in a state of security, if we wish to maintain our great interests, if we wish to maintain our honour, it is necessary that we should have a power measured by that of any two possible adversaries."

And when Lord Palmerston was in doubt as to the person whom, when he came into office for the last time in 1859, he should create Lord Chancellor, it was to Lyndhurst that he applied to solve the difficulty, and it was on his advice that Campbell, then Chief Justice of the Queen's Bench, was selected. "He had always belonged," said Lord Lyndhurst, "to the Liberal party, he was a sound lawyer, and would do no discredit to the Woolsack." When we remember the position and the character of Palmerston, it would be difficult to find a better illustration than this of the opinion that was held by his contemporaries of Lyndhurst's sagacity and shrewdness. Yet his brilliant qualities were sometimes in the zenith of his career marred by a certain irresponsibility and by an audacity which, whilst they often served him well in debate, inclined him to take risks which slower intellects would not have incurred. Still he remains among the Victorian Chancellors a striking and illustrious figure, connecting the mid-Victorian period with Eldon and the eighteenth century, at once a memorable Chancellor and a Parliamentarian of the first order.

It is singular that the man whom we couple with him

was so dissimilar to him. The urbanity of Lyndhurst was in marked contrast to the austerity of Cairns. One passed his life in actual physical enjoyment, the other was always contending against ill-health. The one lived to a great age, the other was prematurely taken from his contemporaries. Yet each attained to a position of exceeding political influence by the sheer force of ability. But Cairns, though he was equal to Lyndhurst as a debater and a politician, was unquestionably superior as judge, and it is for this pre-eminent combination of qualities, as we have said, that Cairns should probably be held to be the first of the Victorian Chancellors. No two men worked harder for their party: but Cairns was a Conservative by conviction, Lyndhurst by choice. It is remarkable, however, that whilst Lyndhurst would have involved the country in a formidable constitutional crisis over Lord Grey's Reform Bill, the more true-hearted party man, as Cairns was, negotiated the passing of the Irish Church Bill of 1869. It would be out of place here to enter into details of this episode, which is political and not legal. It is sufficient to say that the Bill had passed through the House of Commons by a large majority, that in the Lords the second reading had also been carried, but that the measure was in danger of destruction in Committee, and that it was through the disinterested efforts of Lord Cairns that the opposition of the Conservative party was overcome.

This action was not only a remarkable revelation of Cairns' character, but one which stamps him as a statesman of first-rate calibre, who combined boldness with caution, and it exemplifies the influence which he had gained over the Conservative party and shows the position which he attained as a statesman.

Cairns now seems a distant figure belonging to a quite departed generation. In later times, had Lord Herschell not prematurely died at Washington whilst engaged on an official mission to the United States on the Venezuelan boundary question, it is not impossible that he would have won fame as a statesman not less than that of Cairns. Herschell united in an unusual degree conspicuous merits as judge and statesman—perhaps in time he would have become more famous on the larger stage. To a mind of singular quickness he added sagacity and an insight into men, a self-reliance and a self-control which fitted him more than most of his contemporaries for high political office. In 1886 he formed one of the famous Round Table Conference upon the Home Rule question, and in 1892 he was one of the Cabinet Committee which drafted the second Home Rule Bill. Of that Committee Lord Morley and Mr. Bryce are now alone left, and this bare enumeration shows the position which, had fate been kinder, might in time have been Herschell's in the councils of the nation. Though as a judge both learned and quick, the tendency of his mind was probably rather political than judicial, and he has left no mark on English jurisprudence. He was perhaps more supple than Lord Selborne in reconciling himself to the demands of party; and he was free also from the ecclesiastical idiosyncrasies which marked not only Selborne but Hatherley and Cairns. His mind was of a broad and tolerant cast, and he had been educated in a legal school more likely than the Court of Chancery to breed a statesman. Herschell

is in many ways certainly not the least agreeable personal figure of this group of Chancellors, for he was full of varied interests, kindly, friendly, and courteous. Selborne's gravity of manner rarely left him. Cairns' austerity was almost chilling, and, like Mr. Gladstone, he had the old Covenanter's habit of seeing the finger of Providence in acts obviously due to his own volition. Lyndhurst was rather too pronouncedly a man of the world, and the kindly, smiling face of Cranworth, if always pleasing, was a little monotonous. In his life at the Bar and on the Northern Circuit Herschell had not only in his professional work a varied experience of legal business, but on the social side he had been brought into contact with various sorts and conditions of men, and had had opportunities of enlarging his knowledge of different sides of human nature. The difference between the Common Law and Chancery Bars in their effect upon character is certainly obvious in the case of the Victorian Chancellors; and unquestionably more facility in handling men is apparent in those Chancellors whose professional life was passed at Westminster and not at Lincoln's Inn.

After considering the careers of the Victorian Chancellors some may be tempted to think that a lifelong legal training does not tend to make a man a statesman, and that the pursuit of politics does little good to law. It is, however, certain that the combination of law and politics has in every generation given us a group of men at once remarkable and interesting, the like of which is not to be found in any other country. And those who care to study individualities and powerful wills directed to the attainment of legitimate objects of civil ambition

by the straightforward exercise of high attainments will find no more marked and admirable examples than in the Chancellors of the reign of Victoria, even though their influence in English law and procedure has, on the whole, been less than would have been anticipated from their high position.

## CHAPTER XI.

## THE INNS OF COURT.

THERE is sometimes to be seen in an English landscape the remains of a great tree, firmly rooted in the ground, but with a huge and immovable trunk, and without branches, only a few feeble green shoots indicating that life still exists in it. An Inn of Court at the present time may be likened to such a tree: it is there, fast rooted among English institutions, having a certain ancient picturesqueness, but maimed, and with little of its former vigour and luxuriance left. Yet it is so firmly fixed that it is less likely to be removed than many younger growths.

From a purely utilitarian point of view the Inns of Court are anachronisms. When we compare their elaborate but unwritten constitutions, their buildings and their revenues, with present practical results, the difference between their functions now and in the past is remarkable. They have ceased to be great educational bodies; their main business is to admit to the Bar those who desire to practise as advocates in England. Certain tests of fitness are required from those so admitted; and to enable students to pass the examinations instruction is given. But the passing of the examination is the main point upon which the student sets his mind. Thus the

Inns of Court are rather examining than educational bodies. They are also the owners of premises which are the business resort of one branch of the legal profession, but this fact cannot be regarded as in any sense a fulfilment of a public duty; it is now the result of a long-continued custom, but it is a thing which could be as well, if not better, managed by a limited company of ten years' existence as by a society which counts its lifetime by centuries.

Moreover, the creation of a General Council of the Bar has not only deprived the Inns of Court of their old disciplinary functions, but has made the unfitness of these societies to control a part of the legal education of the country more obvious. Yet still they are here, and here they will certainly remain, the object of constant criticism, more historically interesting than practically useful.

To-day, as we have said, the Inns of Court fill a comparatively small place in the legal system of England, and are of no account at all in the social life of the time. Thus their legal and their social importance in the past is apt to be overlooked and forgotten. But England in the fifteenth and sixteenth centuries cannot be understood without a proper recognition of the place filled by the Inns of Court, and of their influence on English law and society, just as to know the society and the politics of Great Britain at the end of the eighteenth century we must appreciate the clubs and coteries of St. James's Street.

For the true realisation of an institution in the past we

require to have before us what may be termed the details of the day, and it is impossible to obtain exact information in any other manner than from original documents. The opportunity now exists to study in detail the history of the Inns of Court in mediæval times. We have not to trust only to the statements of Fortescue and Dugdale; the records of the Inner and Middle Temples, and of Lincoln's Inn can be perused in the fullest detail. Some cynics may remark that the Inns of Court would have done well not to exhibit the vigour of their earlier days so markedly in contrast with the decrepitude of the present. But the historical student will rightly thank these societies not only for their public spirit in publishing their records (a), but for the admirable manner in which they have been produced.

They are called the Black Books of Lincoln's Inn, and begin from 1422, in the first year of the reign of Henry VI. They do not, however, cover the whole history of the Inn as a legal society or college. Older documents there no doubt were, which contained the entries relative to this earlier period.

But the existing Black Books contain an immense mass of detailed information, in which, among much that is trivial, interesting and important facts are embedded:—

- "Besides the admissions, the Black Book contains
- (a) A Calendar of the Inner Temple Records. Edited by F. A. Inderwick, Q.C. 3 vols. 1505—1714.—The Records of the Honourable Society of Lincoln's Inn. 4 vols. 1422—1845.—Middle Temple Records. Edited by C. H. Hopwood, K.C. 1501—1703. 4 vols.—Master Worsley's Book on the History and Constitution of the Honourable Society of the Middle Temple. Edited by R. H. Ingpen, K.C. 1910.

entries of the most varied character: the names of those yearly filling the different offices of the society; the names, after 1518, of those called by the society to its Bench and Bar; the minutes of the governing body; the yearly accounts of the two great officers of the society, the Pensioner and the Treasurer; the accounts of members to whom the special superintendence of some building or other work had been entrusted; narrations of public events" (b).

The Temple has been less fortunate. The Bench Table orders and the accounts down to the reign of James I. have disappeared, as well as a number of old records, rolls, and writings which are referred to in the documents which are, happily, still in existence, and which begin in 1505. The loss of the Inner Temple records would have been more to be lamented if it were not for the preservation of those which belong to Lincoln's Inn. The actual life, whether educational or social, of the two societies did not apparently differ, so that by the aid of the records of Lincoln's Inn we are able to survey the system of legal education in England for many centuries, which was also an important element in the social life of the country in mediæval times. But neither the records of Lincoln's Inn nor of the Inner and Middle Temples give us direct information upon the actual origin of two societies which have filled so important and curious a part in the legal and social history of this country. For remarkable these societies beyond question are. They have been, from their very beginning, a university without statutes and without a definite set of rules, existing under a species of customary organisation. For the orders of the Privy Council -as, for example, those of 1574, which, it is stated, were "established" with the advice of that body and the justices of the Queen's Bench and Common Pleas-appear to be rules drawn up by the Benchers and approved by the Privy Council. The sanction of the Council gave these regulations a force which they would not have otherwise possessed. In other words, they issue from the society which they regulate; they are not statutes or ordinances introduced by a hostile or a supreme legislature. These Inns were, in fact, at once academic and professional bodies, singularly unfettered, exercising functions of the first importance in the national economy, yet wholly free from any species of State control. The education of English barristers, the supervision of the whole body of English advocates, has been the duty of these societies, which in the beginning appear to have been no more than stray aggregations of lawyers and of legal students, who have continued from century to century to manage their affairs free from any external control.

We are so much accustomed to look at the Inns of Court as well-recognised parts of English society, their peculiar organisation has been so familiar to many generations, that we are apt to overlook both the singularity and the continuity of their existence, and the noticeable example they afford of the freedom and the individuality of the English people.

Though, as we have said, the records of the Inns of Court do not give any direct statements as to their origin

-which, indeed, could not be expected-they make the character of that origin pretty clear. A body of lawyers rented some land and premises on the east side of what is now Chancery Lane from two landlords, the Bishop of Chichester and the Hospital of Burton Lazars of Jerusalem in England. The occupation of the first portion was probably between the years 1245 and 1253, when Richard, Bishop of Chichester, filled this see. For in 1466 a statute of the society begins-"In honour of Almighty God, of Jesus Christ our Lord, of S. Mary His mother, and of S. Richard, formerly Bishop of Chichester, late dwelling in this house of Lincoln's Inn, and the true possessor thereof in right of his church of Chichester" (c). For this property the society paid "a yearly rent of 10 marks, reduced by Bishop Arundel to 8 marks, and raised again to 10 marks on that prelate's death. . . . On the southern edge of this estate were houses with back doors opening on to gardens which abutted on Ficketsfield; there were other buildings on the property, some houses used as chambers, a hall with a kitchen and butlery, and a chapel. In 1537 Bishop Sampson sold the land held of the see to William and Eustace Sulvard. Edward Sulvard" (d). from whom it descended to An interesting minute of 1580 shows at once the way in which the estate then became the absolute property of the Inn, as well as the composition of the governing body at that time. A number of lawyers took it into their minds to become tenants of land and buildings for which the ecclesiastical owner had little personal use, and this body of lawyers in later times, without aid or interference

<sup>(</sup>c) Vol. I. p. 1.

<sup>(</sup>d) Vol. I. p. 2.

from the State, decided to make it their home in perpetuity.

The history of the two Temples is somewhat different. Here we have the Knights Hospitallers, or the Knights of St. John of Jerusalem, possessed of the Church of St. Mary and of the semi-ecclesiastical buildings which were grouped around it. This half-priestly order of knighthood was, by the middle of the fourteenth century, decaying as a separate body whilst the lawyers were increasing; and so it came about that in the year 1347 a group of lawyers became the tenants of the Knights Hospitallers, taking possession of most of the secular buildings at a rent of 20 marks a year, and leaving to their landlords the church of the order and its adjoining chapels.

"They also retained in office, as the keeper or guardian of the church, an ecclesiastic known as 'The Master of the New Temple,' who was, under the Prior of S. John, responsible not only for the maintenance of the fabric and for the decoration of the church, but also for the performance of the services and for the lodging and sustenance of the priests" (e).

And so things remained until the dissolution of this famous order in 1540, when the lawyers became the owners of the entire Temple as tenants at will of the Crown. Their title was precarious, and on the accession of James I. there are indications that some of the Scotchmen about the Court would have been glad to turn the

<sup>(</sup>e) Inner Temple Records, Vol. I. p. 20.

lawyers out of their property. The Temples had, however, influence enough to turn this danger into an actual benefit, and in 1608 the societies of the two Temples were confirmed by patent in their possessions. The recital of this document contains these noticeable words: "whereas the Inns of the Inner and Middle Temple, London, being two out of those four colleges the most famous of all Europe, as always abounding with persons devoted to the study of the aforesaid laws and experienced therein, have been, by the free bounty of our progenitors, kings of England, for a long time dedicated to the use of the students and professors of the said laws, to which, as the best seminaries of learning and education, very many young men eminent for rank of family and their endowments of mind and body have daily resorted from all parts of this realm." The patent then proceeds to grant and confirm all the buildings of the Inner and Middle Temple at a yearly rent of 101.. payable by each Inn.

We have stated how, when the Knights Hospitallers granted the semi-ecclesiastical buildings to the lawyers in the fourteenth century, the church was excepted from the grant. This exclusion now came to an end, and all the buildings "commonly called the Temple Church" were handed over to the lawyers. The Mastership of the Temple was, however, vested in the Crown, and not in the Benchers of the Temple. The grant was something more than a confirmation of the possession of the temporal buildings, and an addition by gift of the ancient church—it was a recognition of the position of the two Temples as great colleges of the law. In the new order of things

which was beginning in England it established them securely, linking their mediæval existence with that modern life which has continued to the present day.

Of the division of the legal society which was located in the Temple into two bodies the books of the Inner Temple tell us nothing. But among the MSS. of that society still preserved there "is a pamphlet of twenty-six pages folio, closely written, in the nature of a report, giving an account of the origin and growth of the Knights Templars, of their building of the New Temple. . . . According to this statement, the lawyers . . . in the reign of Henry VI. divided themselves into those two societies, the Inner and the Middle Temples" (f).

This pamphlet is part of the collection of William Petyt, who was Keeper of the Records of the Tower, and in 1701 Treasurer of the Inner Temple. To some extent this account is merely a report transferred to writing, but it is substantiated by passages in the "Paston Letters," some extracts from which are given in the introduction. In these letters the first mention of the Inner Temple as a single society is in 1440. Before that date the reference is to the Temple as an undivided body. There can, therefore, be little doubt that some time in the reign of Henry VI. the lawyers who were associated in the Temple divided themselves into two separate bodies, having, how-Those who occupied the ever, a common church. buildings nearest to the City naturally called their portion of the estate the Inner Temple, while those who lived in

<sup>(</sup>f) Inner Temple Records, Vol. I. p. 17.

the other portion, intermediate between the Inner Temple and Westminster, gave it the name of the Middle Temple.

But at the very time when the Temple was entirely losing all signs of its ecclesiastical character, which in some degree had clung to it for so many years, the lawyers were being troubled still by an ancient privilege. is not the place to dwell on the well-known right of sanctuary, a right which, it need scarcely be said, attached to the Temple Church and its precincts. Adjoining the Temple was that historic refuge of criminals and thieves, Whitefriars, or, as it was commonly called, Alsatia. The result of this proximity was that the Temple was constantly invaded by ruffians of all sorts. Access to the church and its burying-ground "appears to have been surreptitiously effected through houses built on land forming part of the New Temple, which had their front entrance in Fleet Street, with backways into the churchyard." Continual attempts were made by the Bench toprevent this and other means of access. Sometimes doors are to be bolted and barred, sometimes "strongly mured up with bricks;" sometimes it is a petition which is under consideration from the fellows of the Temple, complaining of the disturbances "caused by a disorderly crew of outlawed persons." From these and other details in these records we obtain a lifelike picture of a phase of English society which, however discreditable, cannot be overlooked. By the middle of the seventeenth century the most flagrant disorder in the Temple had been checked, but its precincts for years continued to be the haunt of debtors and disreputable persons, who by no means were always excluded from the Temple itself, and gave to it

an atmosphere of Bohemianism little characteristic of its professional and academic purpose.

It is necessary, however, to return to the foundations of the Inns of Court before describing shortly the system which prevailed there.

It is obvious that before a body of lawyers was sufficiently homogeneous to begin a corporate existence, not only as a college of law, but also as a club, if the expression may be used, of professional lawyers, it must have had some kind of social or professional bond of union. This connexion seems to have sprung from what were subsequently called the Inns of Chancery--originally, there can be little doubt, hostels or common lodginghouses for lawyers and law students. The legal caste had grown into existence in England with surprising rapidity, though in mediæval times it was almost entirely confined to London. Being a caste, there would be a tendency in those who belonged to it to live together, and to form some kind of indefinite corporation. The lawyers in the thirteenth century were collected round the king's courts at Westminster.

"In Edward I.'s day we see that the king has a number l of pleaders, who are known as his servants or serjeants at law (servientes ad legem). Already in 1275 it is necessary to threaten with imprisonment 'the serjeant countor,' who is guilty of collusive or deceitful practice. Also, there seem to be about the Court many young men who are learning to plead, and whose title of 'apprentices' suggests that they are the pupils of the serjeants. We may

infer that already before 1292 these practitioners had acquired an exclusive right to be heard on behalf of others. In that year King Edward directed his justices to provide for every county a sufficient number of attornies and apprentices from among the best, the most lawful, and the most teachable, so that king and people might be well served "(g).

Once we realise a class, however small, of lawyers, however uneducated in legal principles, but with some kind, at any rate, of special knowledge, at the end of the thirteenth century, it becomes easy to perceive that they would live together in houses convenient of access to the king's courts. It is these houses which were the Inns of Chancery, and which appear to have historically a twofold character.

It is probable that in the first instance they were simply common lodging-houses, which gradually lost their private character as their owners died. Thus, in 1344, Isabella, widow of Robert Clifford, demised to the apprentices de banco, or students who frequented the Common Bench, what subsequently became known as Clifford's Inn, and "the will of John Thavie, an armourer, who died in 1348, shows that he was the owner of a hospice which had been, and probably then was, frequented by students of the law" (h). Thavie's, or Davy's, Inn was afterwards, like Clifford's Inn, one of those ten Inns of Chancery which became affiliated to the Inns of Court. In each of

<sup>(</sup>y) Pollock and Maitland's History of English Law, Vol. I. p. 194.

<sup>(</sup>h) Inner Temple Records, Vol. I. p. 12.

the above instances there cannot be a doubt of its earlier character, so that the evolution of the Inns of Chancery producing, as one may say, the Inns of Court, and then falling into definite positions as subsidiary but important members of the collegiate legal system of mediæval and later times, is clear. How truncated and diminished, then, in our day is the great legal academic system of an earlier age!

In their second form the Inns of Chancery have become subsidiary and auxiliary to the larger and more important societies, the Inns of Court. Broadly speaking, there is some analogy between the relations of the Inns of Chancery and the Inns of Court in the sixteenth century and the great public schools and the universities of Oxford and Cambridge in the nineteenth, though there was between the two legal bodies a closer union than between the schools and the universities, a union which grew stronger after the purchase of Thavie's Inn in 1551 and Furnival's Inn in 1548 by the greater society of Lincoln's Inn. In 1565 there is to be found in the Black Books of Lincoln's Inn the following entry in connexion with a meeting of the Benchers of the Society:-" None shall be admitted into this house hereafter unless he have been of some house of Chancery before, under five marks fine. None of Chancery shall be admitted under forty shillings, at his admission to be paid, unless he be an utter Barrister in Chancery and have kept two vacations as utter Barrister there "(i).

It was, therefore, the policy of the Inns of Court to

<sup>(</sup>i) Vol. I. p. 345.

oblige all those who desired admission to one of the legal colleges to have first been a member of the smaller society. In other words, we see, imperfectly no doubt, but clearly enough, a system of graduated legal education. Such a relationship depends on various details which in the lapse of time are necessarily lost; they cannot be restored, as can the parts of a great mediæval building, and so we must be content now to view them more or less in outline. But there was a yet more important connexion between the Inns of Court and of Chancery. The readers both of Thavie's and Furnival's Inns were members of Lincoln's Inn. Of these officials in the Inns of Court we shall have something to say presently. For the moment we are concerned not with the readers of the Inns of Court, but with those of the Inns of Chancery, more especially as connecting the smaller and the larger societies. was the official channel of communication between the society and the Houses. "Every reader of Court is to give order to their Houses of Chancery that the orders for apparells and weapons and study be observed by their companies." The reader was the teacher, the lecturer of those who belonged to the Houses of Chancery, and the responsibility for his efficiency and for the performance of his duties lay with the legal university. Thus, if a member of an Inn of Chancery applied for admission to an Inn of Court, the latter body received a person already educated to some extent in legal principles. There was obviously, therefore, a definite system, a lower and a higher form of legal membership. In 1574 there were approved and recognised by the Privy Council ten orders for the government of the Inns of Court. The ninth order runs thus: "The reformation and order for the Inns of Chancery is referred to the Benchers of the Houses of Court whereto they are belonging: wherein they are to use the advice and assistance of the Justices of the Courts at Westminster." Up to this date the relations between these different bodies may be regarded as customary only; from the moment of these orders they are almost statutory. The order recognises existing practices and sanctions them for the future. At this epoch the Inns of Court, with their affiliated and subsidiary Inns of Chancery, are at the most important point in their history, at once legal colleges and societies for the governance and the enjoyment of the advocates of England.

It is now time to turn to a survey of the character of these great institutions.

We have to picture to ourselves what must, in the language of to-day, be called a college. At either of the two ancient English universities we see grouped under various titles a society of students and teachers, with their hall, their chapel, their library, and their living-rooms, with their rules for education, and their social meetings. scene was the same at Lincoln's Inn and at the Temples in the Middle Ages, where the hall was the centre of the society. It was "the only fire to which the majority of students had access." It is easy to picture the social gatherings in the hall, not always peaceful. Digas," we read in an entry of 1465, "was put out of the society because, on the Sunday before Christmas Day, he violently drew his dagger, in the hall of the said Inn, upon Denys, one of the fellows of the Inn. Afterwards, on the 1st of March, at the instance of several fellows, Digas was readmitted on condition that he should not carry a dagger within the Inn, or the precincts thereof, for one whole year, because he had offended with his dagger in form aforesaid, and, further, that he paid a fine of 40s. for the offence "(k).

Later we read of two students who were put out of commons for an affray between them in the hall. Indeed, it seems to have been a favourite place for a brawl, and the use of the dagger was frequent. Chalynor, on March 11, 1526, "was amerced 10s. for assaulting Stafferton junior with his dagger, and wounding him in the arm." Details such as these in themselves are trivial, but they are both interesting and important when we recollect how they indicate the character of the place and the nature of the gatherings in it. The entries, with numerous others, are important, too, as showing the discipline which existed in the society, a discipline in no sense concerned with legal matters, but characteristic of an academic society. The morality and the conduct—even the dress and the hair -of the members of the Inn was the constant care of the Bench; they were concerned not merely with the ordinary behaviour of those who assembled in the Inn. but with their habits when they were engaged in the ordinary social life of the place. "Purification of Blessed Virgin, 1495. Francis Southwell, John Pole, and Henry Smyth were put out of commons for playing at dice at night within the Inn, in the chamber of the said Henry, contrary to the statutes and ordinances of the Inn. Fined 10s. each "(l). To-day a room in Lincoln's Inn is usually a lawyer's

<sup>(</sup>k) Black Books, Vol. I. p. 40.

<sup>(/)</sup> Black Books, Vol. I. p. 103.

office; in the Middle Ages these rooms were almost identical with the rooms of undergraduates at a university. "For the most part they were long rooms, inside of which a cell or cells were constructed by panelling. These cells, called studies, were the subject of frequent orders by the Bench. The floor-space outside the studies was probably shared in common by the inhabitants of each chamber, and partly occupied by bedding. The Bench lay down that in chambers the junior is to give place to the senior, and on one occasion adjust a dispute about the title to some bedding in the chamber. Each house or chambers was distinguished by a name, such as Le Horsemill, Le Dovehouse, or by references to the occupants or sites of other chambers." They had, in fact, something of a par4 ticular and corporate existence, which made the club-like, social character of the societies more noticeable. They were bodies to which men belonged not merely for legal purposes, but because they formed a society at once legal and social. "Robert Abbot, of Missenden, in the county of Buckingham, was admitted and pardoned his vacations, and was allowed to be at repasts: for these liberties he granted to the society a hogshead of red wine yearly at Christmas as long as he lived." Such is an entry in the records of Lincoln's Inn in 1470. These honorary fellows, to whom there is constant reference in the records, no doubt strengthened the society and gave it a greater importance, but they were not active members of the legal college. The true "Socii," or fellows, were lawyers.

"At the head of the fellowship stood the masters of the Bench, with an executive of governors and officers.

. . . Next to the Bench came the utter barristers. those

who had been called by the Bench to the Bar of the society; and last of all the clerks, whose position corresponds to some extent with that of the law student of the present day" (m).

The position of a bencher was an honourable one; but it was by no means always desired, and from time to time entries are found of members being expelled or fined for not taking the Bench. The Benchers of Lincoln's Inn seem to have met until 1524 in the chapel of S. Richard, the chapel of the society, where there is mention of a council chamber. From the benchers were elected the gubernatores, or rectores—the governors, usually four in number, who remained in office for a year. They were the executive of the fellowship; but after 1575 their functions appear to have been exercised by the whole body of benchers, and the term ceases to appear in the records. Next to the benchers came the barristers—a term which has now grown beyond its original meaning. barrister for many years was not as such necessarily entitled to an audience in the king's court. In the orders of 1574 it is enacted that none shall be admitted to plead in the courts at Westminster, or to draw any pleadings, unless he shall be a reader or bencher of an Inn of Court, or five years "utter barrister," and have continued for that time in exercise of learning, or a reader in Chancery two years at the least. Thus it is clear that the "utter barrister" was no more than a person of legal education who had attained to a certain standing in an Inn of Court. He had taken a legal degree, and the barrister had ceased,

<sup>(</sup>m) Black Books, Vol. I. p. 5.

if one may so say, to be a legal undergraduate, and he had reached a standard of learning which rendered him eligible to be allowed to plead before the king's judges. Doubtless before 1574 there had been caprice and uncertainty in regard to the selection of those who might exercise the profession of advocates. In that year an end is made to this uncertainty, and those members of the legal colleges who had attained to a certain seniority in the society became thereupon qualified advocates (n). The distinction between the state of things in the sixteenth and the nineteenth centuries is important, for the systematised education of the earlier age becomes more apparent when we understand that an "utter barrister" was one who had attained an academic degree only. Lowest in order of the members of the fellowship came the clerks—those who had not attained the legal degree of utter barrister, in fact those who were pursuing a pre-graduate course of study, as those who were barristers for a time, at any rate, were occupied with post-graduate studies.

It may cause some surprise that those who had taken a degree should continue a study of the law. It must be remembered, however, that in the Middle Ages, the, body we are considering did not consist only of professional lawyers. Legal studies occupied a larger place than is now the case in ordinary education, and the Inns of Court

<sup>(</sup>n) In the Judges' Orders, 1614, No. 6 runs thus:—"For that the over-early and hasty practice of utter barristers doth make them less grounded and sufficient, whereby the law may be disgraced and the client prejudiced: therefore it is ordered that for the time to come no utter barrister begin to practice publicly at any Bar at Westminster until he hath been three years at the Bar; except such utter barristers that have been readers in some houses of Chancery."

were a famous university to which young men of the highest rank were proud to belong (o). There are also distinct traces of something in the nature of a general elementary education being given. "Parker," so we read in 1506, "fined 12d. for throwing wyspis in Hall during the drinking time in an insolent way in the Grammar School." The innumerable mention of boyish offences; the resolutions of the Bench as to dress, as in this very year, when the Bench ordered that every clerk should "be decorously clad, and not with his shirt in public view beyond his doublet at his neck"—all point to students being little more than boys; which indicates again that we must take no narrow view of the functions of the Inns of Court and Chancery up, at any rate, to the end of the sixteenth century. We must therefore regard them as filling a great and important place in the general educational machinery of England. The latter word must be used advisedly. Irishmen were prohibited from becoming fellows of the society. In 1437 it was ordered "that no person born in Ireland should in future be admitted as a Fellow of the Society of Lincollysyn; and if any one born there shall hereafter be admitted by any person or persons, he shall be expelled."

In later years, when the rigour of this order was relaxed, and Irishmen, however few in numbers, became members of the society, they were regarded as a class who should not be allowed to mix with Englishmen. They were

<sup>(</sup>o) "These societies were excellent seminaries and nurseries for the education of youth, some for the Bar, others for the Seat of Judicature, others for Government, others for the Affairs of State."--Antiquities of Hertfordshire, Vol. I. p. 431. By Sir Henry Chauncey, who was Treasurer of the Middle Temple in 1685.

ordered, in 1556, to live in the chambers called the Dovehouse, the special character of which at a later period is referred to when it was rebuilt: "to build from the ground the Irishmen's chamber called the Dovecot." It is in such entries as this that we see more vividly than by any amount of description the feeling of the age, and can realise the conditions of an epoch. It is easier also, when we bear in mind the youth of many of the members of the Inns of Court, to understand the place which minstrelsy and revels held in their life.

But it is with the educational system of the Inns of Court that we are now concerned. It reached its perfection in the middle of the sixteenth century; by the middle of the seventeenth it was in process of decay. In the beginning of the seventeenth century it was carried out with a difficulty which had not before been experienced, and after the breaking out of the Civil War it began to assume that partial and indeterminate character which it has borne in modern times. The reason is obvious. A system suitable for a mediæval society, one evolved out of the needs and the characteristics of a particular age, has been continued into years for which its peculiar character is not suited. In the fifteenth century the system of legal education could not be improved.

We have already referred to the composition of the society. Benchers from whom readers or teachers were selected; Utter and Inner Barristers and Students formed three grades of lawyers, the Benchers being, as we have seen, also the governing body of the several Inns, men of the highest experience and eminence in their profession.

For educational purposes the year was divided into terms, learning vacations, and mesne vacations. Many of the entries in the records of the Inns of Court are concerned with the keeping of the vacations by the members, either as learners or teachers. Indeed, "the pardoning of vacations" is so frequently mentioned that it would seem to indicate that there was a much larger number of fellows who made but a partial study of the law than the actual entries would suggest. The pardoning of vacations was also a convenient method of supporting the society, whether by money or kind. "Christopher Hanyngton, one of the Clerks of the Chancery, was admitted to the society in 1482, and pardoned all vacations and admitted to repasts, for which he shall pay a hogshead of wine or 20s. as he pleases" (p).

It is well known that the instruction given at the Inns of Court was chiefly oral; it could not be otherwise until reading and writing became common and easy, and textbooks and reports became numerous. The form which this instruction took was threefold. It was by readings, by moots, and by bolts. The reading was in the nature of a lecture, probably for the younger students. The moot was the argument of a case, the chief form of technical legal instruction. Two members of the Inner Bar had to write upon a case which was chosen and assigned to them. By them it was taken to some of the Utter Bar:—
"The case was to be cast into the form of pleadings, and after the argument at the Bar, in which the utter barristers were expected to join, the puisne of the Bench recited the

<sup>(</sup>p) Black Books, Vol. I. p. 73.

whole pleading, according to the ancient custom. the Bench advanced such arguments as pleased them. any of the Bench advanced more than two points, the reader was to show him that he 'breaketh the common As years went on the mootings became more elaborate, and were a real preparation for the business of legal advocacy. As has been already pointed out, a barrister was no more than a person who had taken a legal degree and who continued post-graduate studies. obvious that with moots an important part of a system of legal education the advocate, whether of mediæval or more recent times, came to his duties in court far better prepared than does the barrister to-day, who has generally to gain experience at the expense of his clients. former days an advocate who stood up to argue a case in court for the first time undertook a task with which he was acquainted, and for which he had been specially The very judges whom he addressed were not unfamiliar to him (q). The practice at the Inns of Court stood him in equally good stead in the House of Commons as in the law courts. The value of it was held in the highest estimation by those responsible for the management of the Inns of Court, for, in addition to moots. there was the similar but simpler exercise—the bolt. 1656 there is an order of the Bench of Lincoln's Inn which gives a picture of this exercise:-

"Ordered that the bolts hereafter to be performed be

<sup>(</sup>q) February 11, 1630:—"It is declared to be the ancient custom of this house that the reader for the time being ought to argue his own case, after that the judges who shall happen to be there present have argued."—Black Books, Vol. II. p. 292.

done by the utter barristers and gentlemen under the Bar in the same place as the vacation moots are usually performed; and that the Put-case standing between the two gentlemen under the Bar that are to argue, put his case, and after they are repeated by the ancient barrister that is then to argue, the Put-case is to sit down between the two gentlemen during the argument, and the Panierman is to place forms both for them that are under the Bar, and for the rest of the gentlemen that attend there "(r). The bolt appears, in fact, to have been a discussion, less formal and more elementary, among the less important members of the society, but equally intended with the moots to quicken the understanding and to give ease and proficiency in the verbal expression of legal arguments. When the value of these exercises ceased to be appreciated by the members of the Inns their practical usefulness for the purposes of legal education began to fail. A minute of 1659 states that "the holding up of the commons in vacation, intended by the Bench for reviving exercises in the vacation, which have been nevertheless neglected, is a charge, beside the fruitlessness thereof, too great for the revenue of the House." Thus, as the seventeenth century nears its end the decadence of the Inns of Court as great legal universities, as educational institutions of the highest value, can no longer be overlooked.

Into the social life of the Inns of Court the entries in these records give considerable insight. Music from the earliest times formed the main amusement of those who belonged to the societies. Growing out of it came the revels, more elaborate and expensive than simple singing

<sup>(</sup>r) Black Books, Vol. II. p. 412.

or playing. They were followed by masques, and these, in their turn, led, in a later age, to purely dramatic performances (s). The importance attached to music, the sums, considerable in amount, spent upon it (t), show the social importance of the Inns of Court. In an age when it was difficult to obtain amusement of a refined kind, the possibility of such enjoyment at Lincoln's Inn and the Temple indicates not only one reason of their popularity, but the place they at one time held in the social life of the age.

The Inns of Court, however, must not be regarded solely as schools of law, without reference to their influence on English society. It is not easy to overestimate their service in the past to English civil and religious liberty. From their very beginning they were purely secular societies. An abbot or a prior was from time to time admitted to them, but he joined them not as the superior, but as the equal of the laymen by whom they were formed and carried on; not to alter their character, but in order to be a member of a fellowship which was at once learned and social. They represented the influence of lay thought on English mediæval education, an influence not ephemeral, but lasting from century to century. The earliest colleges

<sup>(</sup>s) "Between 1660 and 1668 twenty plays were performed at the Inner Temple by professional actors, including plays by Ben Johnson and other well-known dramatic writers."—Inner Temple Records, Vol. I. p. 61.

<sup>(</sup>t) "Accounts of Ralph Scroope, Esquire, Treasurer, 6 & 7 Eliz., 1564-5... Allowances 381. 18s. Including 53s. 4d. to William Perryn and Richard Knight, minstrels [musicis], for their salaries at the Purification, 30s. to William Leade, paid to Robert Jugler, deceased, late harper [lyrator] of the Inn, 38s. 2d. for a supper for the boys of Mr. Edwards, of the Queen's Chapel, and for the staff torches and clubs and other necessaries for the play at the Purification last."

at Oxford and Cambridge were founded for the instruction of the clergy; in the famous universities of Italy—Bologna, Reggio, Modena—the civil and canon law formed the basis of the teaching. Nowhere but at the Inns of Court (u) could the Englishman study the common law, and as a member of a society free from any kind of papal, episcopal, or regal control. Nowhere but at the Temple or Lincoln's Inn could there be obtained an education, secular in its character, in its influence equally hostile to ultramontane and to regal pretensions. The unique position of the Inns of Court in this respect has hitherto been overlooked, because their great position has been insufficiently realised, for at one time they certainly formed, in the language of Coke, a "most famous university for purposes of law."

Moreover, their self-government, the intimate association of men of various ages and stations in the pursuit of a common study was conducive to the enlargement of intelligence, to accuracy of thought, and to the understanding of the rights of individuals. It was at the Temple and Lincoln's Inn that the common law of England, so vital to the growth of the nation, was treasured, studied, discussed, and handed down from one generation of students and lawyers to another, until, like the civil law and the canons, it grew into a definite body of jurisprudence. It is not easy to estimate the exact influence of the education received at the Inns of Court on English jurisprudence and procedure. It is certain, however, that it must have been considerable. It was a practical rather

<sup>(</sup>u) Trinity Hall, Cambridge, was founded in 1350 as a school of civil and canon law, "probably designed to further ultramontane interests."

than a theoretical education, it regarded law in relation to the daily needs of the people, and it fitted students to become legal men of affairs without delay. The entire system was carried on with one main object in view, to fit students for the actual practice of the law. Students met their teachers not as if the latter were professors, but as older and experienced members of the same pro-Thus the tendency of the education at the Inns of Court was to keep the law in its judicially created form, and to produce criticism not of theoretical legal doctrines, but of decisions given in relation to actual facts of social or commercial life. Possibly it narrowed the student's view of law, and made our jurisprudence somewhat unsystematic, but, on the other hand, it caused it to become what is after all the main object of any system of national jurisprudence, serviceable to the community.

When the Inns of Court began to fall into decay, their work as factors affecting the extension of the reign of law was almost finished. We see the results of it in the legal atmosphere which enveloped the constitutional struggle between the Stuarts and their subjects, in the law reforms of the Commonwealth, in the whig doctrines which prevailed at the Revolution. The influence of these ancient schools of law had permeated national life, and interesting as their history is as illuminating some phases of social life in the past, it is essential to remember that above all they formed a distinct and effective element in the developement of English law.

But the question naturally may be asked, Can the Inns of Court ever fulfil a larger part in the future than they

do in the present? No one can be satisfied with the present state of legal education; its systematic study is in this country neglected at a time when the appreciation of legal principles is more necessary than ever. For in the midst of an overwhelming mass of case and statute law legal principles are the only safe guide. Solicitors are subject to examination, but the teaching they receive has to be found by themselves. Quite to the end of the seventeenth century attorneys were members of the Inns of Court. They were suffered as members mainly for the purposes of legal education. In the orders of 1574, which have already been referred to, we read that "if any hereafter admitted in Court practice as attorney or solicitor, they to be dismissed and expulsed out of their houses thereupon, except the persons that be solicitors shall also use the exercising of learning and mooting in the House, and so be allowed by the Bench." As the difference in the nature of the work done by barristers and attorneys became more marked the exclusiveness of the Inns of Court became greater. In 1635 there was an order that no attorney or common solicitor be admitted, yet in spite of it attorneys were certainly members of the society at a still later period. This modern exclusiveness should be altered. The Inns of Court might resume their functions as great legal colleges. They should not limit the legal education which they give to students who intend to practise as barristers. There should, too, be a closer relation between the Inns of Court and the universities. The study of law at Oxford or Cambridge in most instances takes the place of studies which should precede it; and there is a tendency to use the law schools of the universities for the purposes of professional rather than of general educa-

tion. The educational system of the Inns of Court should form either a post-graduate course of legal study for those who have already graduated in more general studies at the universities, or be followed simultaneously with an ordinary university career. This is no more impossible than is the practice of preparing for the Civil Service examinations during the university vacations. Some kind of relationship between the Inns of Court and the universities must, however, be established before the former can be brought into their right position as educational factors. At present nothing is more remarkable than the complete separation and want of sympathy, educationally considered, between the universities and the Inns of Court. Some kind of touch between the two bodies might be created were, as would be quite possible, the professors. and teachers of law at the universities to be members of the governing bodies of the Inns of Court. At the present moment, when the Inns of Court attempt to deal with legal education, the names of the legal teachers of the universities-men much more eminent than some of the practitioners who by age or forensic success become members. of the Bench-are conspicuously absent. It is impossible that legal education can be satisfactorily dealt with by men who are without experience in legal education. may, indeed, be doubted whether a successful professional man can ever, without assistance, be a desirable manager of what should be a college or university. The tendency of his mind is alien to academic thought: in the stress of mature work he necessarily loses touch of elementary teaching. On the other hand, the professional and the academic elements, properly united, make a better managing body than either

If this be so, it is obvious that the educational authority of the Inns of Court—the Council of Legal Education—should have upon it some of those who at the universities have passed their lives in legal teaching and in the consideration of methods of study. In an age of great intellectual activity, when legal principles are entering every day into social and business relations, it is absurd to suppose that, if the teaching of law by the Inns of Court were placed on a broader and more scientific basis, and made more adequate both in regard to legal principles and professional practice, it would not eagerly be taken advantage of. A great school of law in the capital of the British Empire could hardly fail to attract students from all parts of the world, and the increasing facility of intercourse between the oversea dominions of the Crown and England would render it possible for the Inns of Court to again fill the large place which they held The social life of the Inns of Court has in past times. died out; yet in other respects it can scarcely be doubted that there are opportunities of usefulness open which the traditions of these great societies still render feasible (x).

The Inns of Court, though they have in recent years shown some signs of a recognition of the possibilities of their position, are far from having regained the place which the records published in late years so vividly recall to us. To the law school of Bologna students in the Middle Ages came from all parts of Europe, drawn thither by the excellence of the teaching. Is there any reason why in the immediate future societies

<sup>(</sup>x) Upon Lord Westbury's attempt to carry out this idea in 1846, see ante, p. 195.

with so noble an historic past as the Inns of Court should not become the central law school of England and her dependencies? The imperial idea is not necessarily one of expanding boundaries or growing navies; its development also lies in the strengthening of the connexion of England and her colonies by a common education in an ancient and common jurisprudence.

# CHAPTER XII.

# A RETROSPECT.

In the first pages of this book a sketch was given of the beginnings of English law, and the legal scene was briefly surveyed for the first three centuries after the destruction of the Anglo-Saxon polity. Some phases and events in the growth of law and procedure since that time have also been depicted, and their places in the evolution of our legal system have been suggested. It may be useful in this final chapter to summarise some conclusions which may be formulated as we glance at the several subjects which have been discussed.

Two cardinal points seem to emerge from this survey—the flexibility and the permanence of English jurisprudence. The general groundwork of law and procedure once settled, the growth proceeded on the same general lines. There was never any drastic change such as, for example, occurred in France after the fall of the monarchy of Louis XVI. Even during the Commonwealth, as has been told, such changes as were proposed were in the nature of remedies and not of revolutions. The amalgamation in 1873 of the famous Courts of Common Law and Chancery into one Supreme Court, though superficially a momentous change, putting an end as it did to tribunals which had for centuries an independent existence, was

not one in fact. The three Common Law Courts at Westminster—the King's Bench, the Common Pleas, and the Exchequer—had long ago become in a great degree separate Courts of one division or section of tribunals. The union of these and other Courts into a single Supreme Court was, therefore, little more than the giving them a new name, though, as regards procedure, the amalgamation was the means of rendering it more simple and uniform. The Act of 1873 therefore did not alter the manner in which legal changes had hitherto occurred in England, though it was nominally, at any rate, a remarkable historical break. Yet permanent as has been not only the general body of law, but the system of civil and criminal procedure, neither the one nor the other has ever failed-perhaps sometimes tardily—to respond to the demands of the public. This has occurred in spite of the force of professional opinion which has been very conservative, and even during the Commonwealth, at a time peculiarly favourable for legal changes, was able to embarrass to some extent the efforts of law reformers. In truth, English law has always been susceptible to external influences, and on its commercial side absorbed principles and rules which had grown into customs among traders on the Mediterranean and on the North Sea which, as we have also seen, were enunciated in distant European towns.

From the fact that it is largely composed of judicial precedents it has also felt and shown in a marked degree, at certain times, the influence of individual members of the Bench. At the end of the eighteenth and in the first half of the nineteenth century this influence was most apparent, because the courts were then so constituted that

judicial individuality had plenty of play. Legislation had not yet raised innumerable points for judicial discussion, and there was ample opportunity for the statement of legal principles; it was an age of "leading cases." But this judicial influence would not have had so much effect, if the legal system had not from its beginning been highly centralised, and at work in a country of small size, so that a judicial decision had all the power of a legislative enactment.

By the House of Commons English law has been criticised and protected, and law and procedure alike exemplify the beneficent effects of popular government, and sometimes also its defects. In the history of Bankruptcy legislation we see an excellent example of the influence of Parliament—reflecting the changes of public opinion—on a branch of law the substance of which has always been statutory, though it has received innumerable judicial glosses.

Throughout the ages English law has been constantly in a state of slow evolution, and, trifling as some of changes appeared at the time—if we review the centuric which lie between to-day and the Anglo-Saxon epoch—we are struck with the importance of the results of the aggregate of small things. Of all the influences which have affected civil law the most important appears, as was to be expected in this country, to be that of commerce: in some form or other, it was always making itself felt with increasing force, and constantly enlarging the body of the common law, and, as we have noted—as illustrated by the Commercial Court—affecting procedure. If, there-

fore, one conclusion more than another is to be drawn from any review of English law in the past it is the importance of regarding it not as a subject separate and apart, fit for the study of a special class of students and for the labours of practitioners, but as one inseparably connected with and affected by the movements of politics and society from its very commencement.

Again, in a survey of this kind, we cannot fail to be constantly reminded of the passion for legality which has always characterised the English people, and which it is suggested was not a little due to the existence of a central legal university—the Inns of Court—at which men from all parts of England and of all degrees of society were students, and from which a knowledge of, and respect for, law were disseminated into the remotest corners of the kingdom. We see this characteristic—the desire for legality—in the Laws of the Forest, and in the forestal judicial system rude as it was. Doubtless, many wrongs remained unredressed, but in the forestal areas an elaborate system of justice was found in mediæval times, which at any rate mitigated the power of the strong arm and carried a sense of law into the wildest parts of the land. We see it also on the sea, where the personal authority of the Lord High Admiral grew into a judicial tribunal for the settlement not only of maritime disputes but of those. as to the validity of the capture of a prize in time of war. This last is, perhaps, as remarkable an instance as can be found, because in no other European country was the question of the right to a prize regarded from the same legal point of view.

English law is often stated to be chaotic and wanting in precision, but if we cast our glance over the spaces of time which extend from the beginning of the thirteenth century to our own day, and note the working of the English legal system and the action of English jurisprudence, we may very well be satisfied with one and the For, making the necessary allowance for individual and national imperfections, for the difficulties which surround the ascertainment of legal obligations, rights, and remedies, in times less civilised than our own, it is certain that English law and procedure have always been serviceable and useful, in a word, popular. they have answered to national requirements, and they have remained abreast of national demands—as in regard to the Law of Evidence—and, after all, more could not and ought not to be expected.

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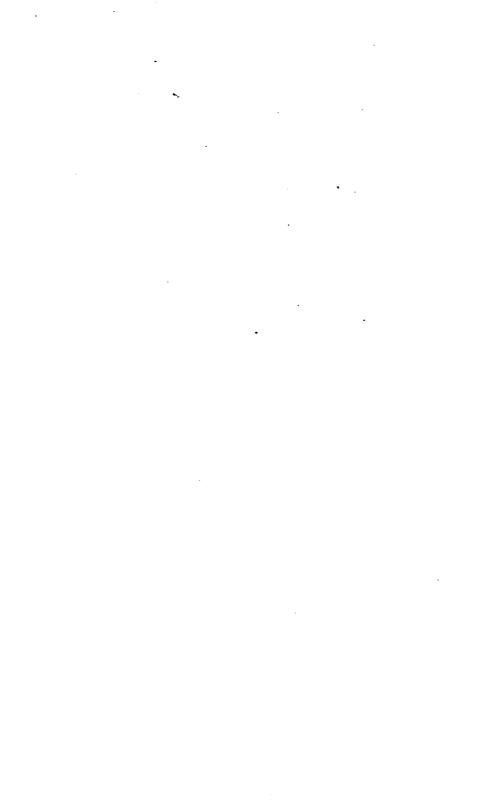
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# THE ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND

BY

# ROBERT ROBSON

Fellow of Trinity College Cambridge

CAMBRIDGE
AT THE UNIVERSITY PRESS
1959

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# CAMBRIDGE UNIVERSITY PRESS

1959

TO
THE MEMORY OF
MY FATHER

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## GENERAL EDITOR'S PREFACE

In the preceding volume in this series Professor Plucknett, in a masterly first chapter entitled 'Maitland's View of Law and History', shows that the notion, if it were entertained, that legal history must be annexed to the study of law would be entirely misconceived, and that to make legal history the preserve of professional lawyers would indeed be to condemn it to extinction. A glance at the list of authors in this series of studies shows that, if the general editor had been compelled to limit his choice to qualified lawyers, the series would long ago have come to an end.

Once more the general editor has prayed in aid the sister faculty, with he believes great profit to the student of legal and social history. The pages of the popular press show how large a part law and lawyers play in the social life of the present day. It has always been so, and yet in any book on social history the proportion of it which is devoted to the functioning of the law is far smaller than that topic merits. The reason for this defect is, no doubt, the fact that the writer of a general survey must base himself on the detailed research of others, and that research upon the relation of law to life has been meagre. But gaps are being filled. The most notable modern contribution in this field has been that of Professor Bertha Putnam to our knowledge of the work of justices of the peace in the Middle Ages. It is fortunate that one of the leaders in eighteenth-century studies set to Dr Robson the task of bringing similarly to life the attorney of the latter period. It was an exacting task for it required the scrutiny of archives ranging from Essex to Cumberland.

The title of his book will puzzle the many who do not know that attorneys and solicitors were separate classes of the legal profession until the middle of the eighteenth century. The amalgamation of those two branches, and the supersession of the more ancient and dignified title by the more modern and lowly one, are part of Dr Robson's story.

In the seventeenth century solicitors were men who performed in cases before the Council and in Chancery functions similar to those of attorneys in the common law courts. Attorneys had an ancestry reaching back to the thirteenth century, solicitors were newcomers.

In a valuable monograph on the Star Chamber, written before 1635 by William Hudson, of Gray's Inn, but not published until 1792, there occurs the passage, 'In our age there are stepped up a new sort of people called solicitors, unknown to the records of the law, who, like the grasshoppers in Egypt, devour the whole land'.

But by the end of the eighteenth century the wheel had turned full circle. Dr Robson tells us, on page 152, that one of the characters in Maria Edgeworth's novel, *Patronage*, published in 1814, remarked, 'There are no such things as attorneys now in England, they are all turned into solicitors and agents, just as every *shop* is become a *warehouse*, and every *service* a *situation*'.

Dr Robson explains this change of fashion by the fact that the adjective 'pettifogging' had come to be linked all too frequently with the noun attorney, while solicitor suffered from no such pejorative association.

At any rate it is as 'solicitors' that the 'gentlemen practisers in law and equity' preferred to be known, and the title was given statutory recognition in the Judicature Acts, 1873-5. And so the sonorous title 'attorney' survives in England only as that of the Leader of the Bar, though in the United States it flourishes in high esteem side by side with the excellent word 'counsellor'.

I hope that some of the thousands of solicitors practising in this country may catch sight of an advertisement of Dr Robson's book, and may be inspired to purchase it for their firms and thus encourage further research into the antiquities of their profession.

H. A. H.

December 1958

## PREFACE

THERE has been no previous attempt at a social history of the profession of attorneys and solicitors in eighteenth-century England. In recent years there have been studies of the parish clergy and of the medical professions during this period. These are as yet unpublished, and I am grateful to their authors, Mr P. A. Bezodis and Dr B. M. Hamilton, for allowing me to see their work. My own research has in some ways proved complementary, and has suggested that this was a period of crucial importance for the history of the professions in England. It has also tried to show how important the attorneys were in the working of English society in the eighteenth century.

The main MS. sources which have been used are indicated at the end of the work. In general, the working papers of attorneys have proved of limited use for a study of this kind, and are difficult to quote briefly and intelligibly. They have, however, been extremely useful in creating an impression of the nature and of the importance of the attorney's work, even when, as is often the case, the attorney's personal papers have been destroyed and only those belonging to his clients have been preserved. I am most grateful to the various county archivists and librarians whose papers I have used, and particularly to Mr F. G. Emmison of the Essex County Record Office, and Mr W. P. Lamb, formerly the City Librarian of Sheffield, for their kindness in depositing bulky collections of documents for lengthy periods in my college library. Mr T. Gray of the Cumberland County Record Office allowed me to arrange the unsorted Hodgson papers so that I might use them more conveniently.

For permission to use the Wentworth Woodhouse papers at Sheffield I am indebted to Earl Fitzwilliam and his trustees of the Wentworth Woodhouse Settled Estates. The Librarian of the Royal Institution of Cornwall enabled me to see the Journal of Christopher Wallis deposited with him by Mr J. Percival Rogers. I quote from W. E. Beasley, The Early History of a Leicester Firm of Attorneys, by permission of Mr Beasley's Executors, and from The Memoirs of William Hickey, vol. I (1913) by permission of Messrs Hurst and Blackett, Ltd. I have also received help from

many persons and societies who possessed records of eighteenthcentury attorneys. These include Mr A. N. L. Munby, Mr R. C. Reginald Nevill, Mr Henry Potts, and the secretaries of the Liverpool Underwriters' Association and of the provincial law societies mentioned in chapter IV.

The many pamphlets which have proved valuable are listed at the end. Some of these are only available in the Library of the Law Society in Chancery Lane, and I am indebted to the Council of the Law Society for permission to consult them there.

The attorneys touched society at many points, and there are traces of their activities in many of the contributions which have been made to the social, political, and economic history of the period. Where I have made use of these, I have indicated the work in footnotes, and for that reason I have not compiled a separate bibliography of secondary works. The only ones which are directly relevant are three short volumes by E. B. V. Christian, A Short History of Attorneys and Solicitors (London, 1896); Leaves of the Lower Branch: the Attorney in Life and Letters (London, 1909); and Solicitors: an Outline of their History (London, 1925).

This subject was suggested to me by Dr J. H. Plumb, and my work on it was supervised by Dr Plumb and by Dr G. S. R. Kitson Clark. I am deeply indebted to both of them for much encouragement and advice over a lengthy period. I have also benefited greatly at a later stage from the comments of Professor H. J. Habakkuk, Professor Edward Hughes, and of the Editor of this series, Professor H. A. Hollond. It is my fault that this work is not more worthy of the attention which has been bestowed upon it by these scholars, and of the generosity with which the Master and Fellows of Trinity College surrounded its writing and rewarded its completion.

R. R.

TRINITY COLLEGE CAMBRIDGE

**26 June** 1958

#### CHAPTER I

# ATTORNEYS AND SOLICITORS BEFORE 1700

THE present division of the legal profession into barristers and solicitors existed in the eighteenth century, and the division of labour in its present form had in many respects already been established. Indeed, as far as the essential difference between the two branches of the profession was concerned, the distinction between those who were permitted to plead a client's cause before the judges, and those who could only conduct it up to this stage, it may be said to have existed in the sixteenth century. This distinction was marked by a difference in the organisation and regulation of the two branches, and was itself the product of the theory and practice of the law in medieval England.<sup>1</sup>

The idea that a man could stand in place of another in legal disputes, that he could be his attorney, was alien to early conceptions of the law, and was perhaps inappropriate to the simpler structure of society. To appear in court by attorney was at first a privilege restricted to the king, for whom such a representation was an obvious necessity. Gradually the privilege was extended to others, but it survived surprisingly long as a privilege, and was not readily conceded as a right to be demanded by all litigants. Eventually, however, the concession which the king at first allowed to favoured subjects was made to all who sought it. The growing complexity of society and of its laws involved more and more people in litigation, and in litigation so abstruse as to demand the technical assistance of those skilled in the law. It was in response to this need that the legal profession arose, and naturally enough, attorneys came to be chosen from those who, by habitual attendance on the courts, had acquired a special knowledge of their practices.

But if the appointment of an attorney was at first rare because it

1

<sup>&</sup>lt;sup>1</sup> This historical introduction is based entirely on secondary sources, namely, F. Pollock and F. W. Maitland, *The History of English Law* (2nd ed., Cambridge, 1923); W. S. Holdsworth, *A History of English Law*, 11 (3rd ed., London, 1923), VI (1924), and XII (1938); and E. B. V. Christian, *A Short History of Solicitors* (London, 1896).

conflicted with early notions of the law, the assistance of a pleader was commonly allowed and was entirely in harmony with these ideas. The pleader or barrister did not stand in his client's place, but only used his skilled voice on his behalf, and this was not a function which had to be conceded as a privilege by the king or his judges. Consequently there was in the case of the barristers no basis for the kind of control to which the attorneys, in their highly privileged and slightly unusual position, were submitted. They lived in the Inns of Court in circumstances chosen for their own convenience, and admitted newcomers to membership on conditions which they themselves laid down.

The attorneys in contrast were early subjected to close regulation by the judges and by parliament. And, whereas the barristers organised themselves in the Inns of Court, the attorneys were compelled to belong to the Inns of Chancery by the judges, and the Inns of Chancery were themselves dependent on, and subordinate to, the control of the Inns of Court. 'The attorney was never allowed to forget that he was an officer of the court and subject to its discipline. The barrister, on the other hand, was in no sense an officer of the court, and was much less directly under its control.'

As early as 1292, 'The king directed his justices to provide for every county a sufficient number of attorneys and apprentices from among the best, the most lawful, and the most teachable, so that the king and people might be well served'. On this occasion it was suggested that 140 such men might be enough, but the matter was left to the discretion of the judges.

This matter of the number of attorneys was a chronic complaint, and in 1402, as a result of such grumbling, it was enacted that all attorneys should be examined by the judges before being put on the Roll.<sup>3</sup> They were to be 'good and virtuous and of good fame', and 'received and sworn well and truly in their offices'. And it was further laid down that 'if any such attorney be hereafter notoriously found in default of record or other wise, he shall forswear the court and never be received to make any suit in any court of the king'. In London, and later elsewhere also, special rules governed the behaviour of attorneys who were admitted to practise in the local courts.

<sup>1</sup> Holdsworth, op. cit. VI, 434.

<sup>&</sup>lt;sup>2</sup> Pollock and Maitland, op. cit. 1, 216.

<sup>&</sup>lt;sup>3</sup> 4 Henry IV, c. 18: Christian, Short History, p. 19.

But the complaints about attorneys continued, and the act of 1455¹ to limit the number of attorneys in Norfolk and Suffolk was in answer to a petition which said that there were many people 'not being of sufficient cunning to be any attorney, which go to every fair, market, and other places where congregation of people is, and stir, procure, move and excite the people to make untrue suits, foreign suits, for light offences and small sums of debt', and asked that the number of attorneys allowed to practise in the two counties should be limited to fourteen—six for each county and two for Norwich.

By the sixteenth century the present distinction between barristers and attorneys existed and was insisted on. It was given institutional representation in the deliberate attempt to exclude attorneys from the Inns of Court in order to prevent them being called to the bar. The character of the attorneys' work can be defined negatively as comprising all that barristers did not insist on keeping to themselves. Beyond this, it was decided by the demands of society, demands which ultimately had the result that attorneys did much work which had habitually though not legally been confined to the bar. In the sixteenth century it is possible to say that attorneys existed as a professional class in the sense that men now generally turned for legal aid to a man of some professional training and experience, and that many such men existed. But it would be too much to say that they were a professional class if by that is implied the existence of professional institutions and fixed standards of professional education and conduct. Indeed, it may be that a professional class in this sense existed less and less during the sixteenth and seventeenth centuries as the almost exclusive concentration of lawyers in London was broken down, and men were increasingly able to find enough problems of a legal sort to occupy them in a country practice, problems which might only rarely bring them up to attend on the courts in London.

This being so, whatever degree of institutional representation had formerly been given to the attorneys by membership of the Inns of Court or Chancery was diminished, though the attempt of the judges to insist on it, in order to have some control over the profession, went on long after it ceased to be desirable, or even feasible. These attempts may, indeed, be indirect recognitions on the part of the judges that the profession was growing larger and

<sup>&</sup>lt;sup>1</sup> 33 Henry VI, c. 7.

# 4 THE ATTORNEY IN THE 18TH CENTURY

more scattered and hence less controllable, compelling them to insist on outmoded means of regulation because no others existed.

In the main act of parliament which sought to control the attorneys before the eighteenth century, they were linked with the solicitors. 1 Just as the attorneys had come to perform whatever were not the exclusive functions of barristers, and to fill a need which the barristers could not completely satisfy, so the solicitors arose to answer needs catered for neither by barristers nor attorneys. The solicitors were a group known in the fifteenth century.<sup>2</sup> They assisted the attorneys, and managed business which fell outside their scope. They were not officers of the common law courts, and it was to the development of 'the new work and new needs introduced by the growth of the jurisdiction of such courts as the Star Chamber, the court of Chancery, and the court of Requests, that the solicitor owes his elevation from the position of the servant or agent of the litigant or attorney, to the position of a professional man on a level with the attorney'. By the middle of the sixteenth century they were a group sufficiently definite to be excluded along with the attorneys from the Inns of Court. During the seventeenth century attempts were made to define the solicitors' work, claiming that 'It is not enough for the Solicitor to be, as it were, the Loader to the Attorney, or the Intelligencer to the Client'. These had been the earlier functions of the solicitors, but by the middle of the century certainly they had come to have a more closely defined sphere of practice in which they were alone. A certain amount of prejudice against solicitors was still felt by attorneys, but as attorneys came to practise as solicitors, and solicitors of five years' standing could practise as attorneys, the division between them became blurred.

At any rate they were lumped together in 1605, and contrasted with the 'just and honest serjeant and counsellor at law', who considered themselves 'greatly slandered' by the disrepute into which the conduct of their inferior brethren brought the profession of

<sup>&</sup>lt;sup>1</sup> 3 Jac. I, c. 7; an act 'to reform the multitudes and misdemeanours of attornies and solicitors at law'.

<sup>&</sup>lt;sup>8</sup> By c. 1450 the term 'solicitor', used earlier simply of one who 'urges, instigates, or conducts business on behalf of another person', had come to mean one who concerned himself with legal business but who was neither an attorney nor a barrister (Holdsworth, op. cit. VI, 449).

<sup>&</sup>lt;sup>3</sup> *Ibid.* pp. 454–5. <sup>4</sup> *Ibid.* p. 449.

<sup>&</sup>lt;sup>5</sup> Compleat Solicitor, 1668; quoted ibid, p. 452.

the law. Some differences between attorneys and solicitors were recognised. Attorneys were required to have been brought up in the King's Courts, or be 'otherwise well practised in soliciting of causes', and also 'have been found by his dealings to be skilful and of honest disposition'. All that was required of a solicitor was that he should 'be a man of sufficient and honest disposition'. The act further provided that an attorney was to produce receipts for any fees he claimed to have paid on behalf of his 'client or master', together with an elaborate statement of all the work he claimed to have done. Heavy penalties were imposed for delaying suits, and attorneys were not to allow unqualified persons to bring suits in their names.<sup>2</sup>

Although there was no more legislation to discipline the profession between this act and that of 1729, there were frequent complaints about the excessive numbers of attorneys. There was a parliamentary committee on the subject in 1672, and a bill in parliament in 1700. In the absence of legislation, however, there was a good deal of activity on the part of the judges to control the profession. They tried to keep down numbers by insisting on a fixed period of apprenticeship before admission. A rule of the court of Common Pleas of 1633 prescribed six years' service as a clerk to an attorney. It was followed in 1654 by a rule of the Judges of the Upper Bench prescribing a period of five years' apprenticeship, and an examination to prove the candidate 'of good ability and honesty for such employment'. At least twelve examiners were to be appointed every year to conduct this examination. It was claimed that these examinations were not rigorously insisted on for many reasons, among them the conduct of the judges themselves. 'A judge considers every attorney he admits as a new client who may bring him business, and therefore his lordship is not severe respecting the attorney's knowledge, the want of which tends to increase the business of the judge's chambers.'8

Nevertheless, both in London and on circuit the judges did

<sup>&</sup>lt;sup>1</sup> Quoted Holdsworth, op. cit. p. 456.

<sup>&</sup>lt;sup>8</sup> By the regulating act of 1729 sworn attorneys were entitled to practise as solicitors without paying additional fees, but it was not until 1750 that sworn solicitors were granted the reciprocal advantage of practising as attorneys. All trace of the division disappeared when the Judicature Acts of 1873 classed them all as solicitors of the Supreme Court.

<sup>&</sup>lt;sup>8</sup> Cunningham, The History and Antiquities of the Four Inns of Court..., extracted from Dugdale (1780); quoted Christian, Short History, p. 82.

something to control the professional conduct of attorneys. In Cambridge, for example, in 1665, 'John Patteson an Attorney at Law stood in the pillory on the Pease Hill...from about a quarter after eleven in the forenoon, to about half an hour after twelve of the clock having fastened to the fore part of his hat being on his head a paper written in capital letters (a common barrator) being sentenced by Judge Keeling at the...Assizes'.1

In theory the control of the profession was complete at the beginning of the eighteenth century. The practice and the numbers of the attorneys were controlled by parliament, and this was supplemented in detail by the orders of the judges which affected all who wished to practise in their courts. In theory there was a fixed period of apprenticeship, and an examination before admission to the Roll. In theory they were all 'brought up in the courts or otherwise well practised in soliciting causes and proved by their dealings to be skilful and honest'. No one in the early eighteenth century could have believed that this was the case with the profession: there were, perhaps, not many who believed that any laws could ensure that attorneys would be 'skilful and honest', 'good and virtuous and of good fame'. Fewer still can have expected that attorneys themselves would ever be concerned to see that theory and practice should in this matter more nearly coincide.

<sup>&</sup>lt;sup>1</sup> Cambridge Antiquarian Society, Octavo Publications, XXIII (1890), The Diary of Samuel Newton, 1662-1717, p. 10.

#### CHAPTER II

## REGULATION OF THE PROFESSION

ON 4 February 1700 Evelyn noted in his diary that the House of Commons had 'voted that the exorbitant number of attorneys be lessened, (now indeed swarming and...eating out the estates of people, provoking them to go to law)'. In March 1701 leave was given to bring in a bill for the reduction of the number of attorneys and solicitors, and for regulating their practice.¹ It received its second reading on 16 April, and was committed to the legal members of the house, but is not mentioned again.

The judges continued their work in the absence of this act, and controlled the profession with the means at their disposal. In 1704 they laid it down that all attorneys should belong to some Inn of Court or Chancery. This, however, proved impossible to enforce. The Inns of Court existed for quite other purposes than the judges were seeking to use them for, and could not be compelled to admit attorneys. The barristers, perhaps resenting the encroachments of the attorneys, and determined to preserve some distance and distinction between them, were successful in their attempt to exclude the attorneys from the Inns of Court.<sup>2</sup>

What in part the judges had wanted was that each attorney should have a London address where writs and the like could be served on him, as well as putting them under the control of some body which could supervise them more closely than had been possible in the past. It may be that the judges knew that the Inns of Court would not admit the attorneys, and that they would in consequence be forced into the Inns of Chancery, which had been more properly their province, and which in the early stages of the

<sup>1</sup> Commons Journals, XIII, 31 March 1701. It seems to have aroused at least one pamphlet: Observations on the Dilatory and Expensive Proceedings in the Court of Chancery, etc. (1701) (see bibliography for full title).

On this, see Holdsworth, op. cit. VI, 441; and H. Hale Bellot, 'The Exclusion of the Attorneys from the Inns of Court', Law Quarterly Review, XXVI, 137-45. In 1706 a bill was introduced by Lord Somers into the House of Lords to regulate proceedings at law. The bill was passed by the Lords, but defeated in the Commons, where 'the interest of under-officers, clerks, and attornies, whose gains were to be lessened by this bill, was more considered, than the interest of the nation itself' (Cobbett, Parliamentary History, VI, 517-18).

profession had played some part in their education. But by the eighteenth century, these were decaying bodies. And, moreover, as the country attorney became more important, and, as provincial life grew richer, more stationary in his own locality, membership of an Inn in London became increasingly pointless. The system of moots and readings in the Inns of Chancery had greatly declined, and in any case was no substitute for the apprenticeship system as a training for an attorney. Nor was the profession yet sufficiently coherently organised for the Inns of Chancery to play the sort of role that the Metropolitan Law Society was to adopt as a controlling, and, above all, as an examining body.

But there were signs fairly soon in the century that such ideas and needs as would eventually produce the Law Society were being discussed. The Society of Gentlemen Practisers was in being at least as early as 1739. The attorneys had, after all, the example of the barristers as a highly organised and articulate body always before them, and more particularly, before the more affluent members of their profession in London and the provincial centres, from whom the stimulus to reform was likely to come in the first instance. But the solution of the problem which was provided by internal regulation is a separate story, and will be treated later. In the meantime, further suggestions were being made for the external regulation of the profession, and the first moves towards the act of 1729 become discernible.

Proposals for reform were many, some idealistic and too general in character, others extremely detailed and realistic in their suggestions, and clearly springing from a close acquaintance with the conditions of the attorneys' employment, and the needs of their clients. A pamphlet published in 1724 abandoned generalities, and included lengthy proposals for regulating the profession in the form of a draft bill to be put before parliament. In some ways the measures suggested closely resembled those incorporated in the act of 1729, but in others, especially in the matter of controlling entry into the profession, they went far beyond them.

It was proposed to permit no one to practise as an attorney or

<sup>&</sup>lt;sup>1</sup> An Essay on the Amendment and Reduction of the Laws of England, for the ease of the subject, the advancement of justice, and regulating the profession of the law. Quotations are from the second, corrected, edition of 1726. An earlier pamphlet touching on these matters, Proposals Humbly offered to the Parliament for remedying the great charge and delay of suits at Law and in Equity, was published in 1707, and ran into at least seven editions.

solicitor who had not served a clerkship of five years with a qualified practitioner, under a penalty of £500. After this apprenticeship, it was suggested that the clerk should apply for membership of one of the Inns of Court, who would examine him, and administer to him an oath 'To do no falsehood or deceit in his practice, not to delay causes for lucre, nor increase any fees, or undertake any false or malicious suits, etc.'. Those admitted were to be given a certificate of the examination and the oath, which would permit them to practise as attorneys in any of the king's courts. For the convenience of country attorneys the judges were to appoint examiners 'from among the oldest and most experienced practisers of the law', who would vouch to the Inns of Court for the character and qualifications of such as they approved. Country attorneys were also to be exempt the expenses of the Inn, save a small fee as 'out-members'.

No attorney was to have more than two clerks at any one time. Beyond this, and most significantly, it was to be laid down that attorneys should not 'take or admit into their offices, any persons to be their clerks, whose parents or themselves have not freehold estates in lands, tenements, or hereditaments, of the value of £40 per annum, or are not worth £1000 in money'. Attorneys were not to permit unqualified persons to practise in their names, under pain of disqualification, and heavy fines were prescribed for those attorneys convicted of making malicious arrests, delaying suits needlessly, making false bills and the like. It was further suggested that once a year the judges should hold a court for hearing complaints against attorneys. 'A jury of honest clerks and attorneys shall...inquire into and try the abuse and the extortions of the attorneys and solicitors complained of, and if the said jury of attorneys shall shew any favour or partiality...they shall be liable to attaint, and to forfeit each juror f.100.'

Whether or not these suggestions had any direct effect on the act of 1729 does not appear. But at least they are among the signs that thought was being given to the problem of regulating the profession, and they are clearly the work of an informed and responsible critic. The petition of the justices of the West Riding, which was presented to the House of Commons in February, 1728/9, and which was directly responsible for the act, complained principally of the activities of unqualified persons who were practising as attorneys. This

<sup>&</sup>lt;sup>1</sup> Commons Journals, XXI, 236, 25 February 1728-9. It is not clear why so much of the stimulus to legal reform should have come from Yorkshire. Professor

petition, together with others in identical terms from the justices of the East Riding, and from the Liberty of St Peter at York, were referred to a committee presided over by Sir William Strickland, M.P. for Scarborough, and a Lord of the Treasury. This committee conducted a close investigation into the problems raised, in the obvious way available to them, which was to examine the officers of the various courts who were responsible for the admission of attorneys. Their findings, which were communicated to the House on 14 March, give a detailed picture of the state of the profession from this special point of view, a picture perhaps less violent in its colourings than that painted by many contemporary pamphleteers and commentators, but which nevertheless suggests that there was some justice in their complaining.

Sir George Coke, Prothonotary of the Court of Common Pleas for twenty years, gave evidence about the attorneys of that Court. He claimed that he 'never entered any clerks in his office, but such as had served their time, or were well recommended by practisers, that he knew, or the Master with whom they served their clerkship'. More than a thousand clerks were entered on his books: he did not claim to know them all by name, but knew some of them 'by person'. Many had been entered on the recommendations of the agents of country attorneys without his having seen them personally. He said that many people were accustomed to sue out writs from his court who were not on its Roll. All who were sworn as attorneys paid a stamp duty of £6. Attorneys' bills were in Court hand and in Law Latin, but Sir George saw no reason why they should not be in English, and in ordinary hand. He agreed that a great many trifling actions were brought in the prothonotaries' offices, but thought that there was more business at the present time than there had been formerly.

The corresponding officer of the court of King's Bench said that none were admitted attorneys of that court unless they produced a certificate to show that they had served at least five years with some clerk or attorney of the court. The clerks of judges and serjeants at law had the privilege of being sworn in order to practise without

Hughes suspects that the clerks of the peace, jealous of encroachments on their preserves, were behind these petitions (Edward Hughes, 'The Professions in the Eighteenth Century', *Durham University Journal*, New Series, XIII, ii, 50). Petitions against law proceedings in Latin came from the East and North Ridings in 1731, and the bill to rectify this was introduced by Sir George Savile (Cobbett, *Parliamentary History*, VIII, 843-4, 858-9).

these requirements. He too admitted that a great many practised as attorneys who had never been sworn, but maintained that there was no power to prevent them. It was also the case that sheriffs' officers often took out writs in the name of an attorney without first obtaining his permission. John Croft, of the Middlesex Office, also told the committee that writs were frequently taken out in the names of attorneys without their cognisance. He said that he had known 1100 writs to be issued in a vacation, and about 3000 in a year. Similar evidence was produced by an officer of the Exchequer Office.

Another witness claimed that many people who called themselves prothonotaries' clerks practised as attorneys, and that he had heard that 'several broken tradesmen and bailiffs, do practise as attorneys and often set the people at variance, and have got £10 or £20 of each party, by being concerned, and, before the matter comes to trial, make the affair up between their clients for a bottle of wine and a treat'. Robert Appleton said that he knew 'one who is a farmer, and another a sailor, and about 20 or 30 more who practise and never were sworn: that he knew one that made out a bill for £24 and took £5 for the whole'. He claimed that there were only six sworn attorneys in the whole of the East Riding.¹

Finally, the committee questioned the Commissioners of Stamp Duties. They too claimed that a great many practised who had not been duly sworn, 'by reason of which (the revenue) is greatly injured and lessened'. Counsel had been consulted in this matter, but they had advised that as the law stood, such people could not be prosecuted.<sup>2</sup>

This evidence was held to be sufficient to prove the allegations of the petitioners, and leave was given to introduce a bill for the better regulation of the profession. This bill received the royal assent on 14 May.<sup>3</sup> Most of its stipulations were to be effective from

<sup>&</sup>lt;sup>1</sup> One witness, from the Warrant of Attorneys Office, estimated that there were about 420 sworn attorneys in all; another that there were not more than 200 sworn attorneys and clerks in the court of King's Bench.

<sup>&</sup>lt;sup>2</sup> This was not the first time attorneys were suspected of avoiding the stamp duties. In 1706 a reward of £150 was given to the Solicitor to the Stamps Commissioners for his diligence in 'discovering many great abuses committed in the Stamp Revenue by attorneys' (C[alendar of] T[reasury] B[ooks], xx, iii, 771-2). Attorneys were prosecuted on this account in 1707, and put forward the excuse that their clerks and others who practised in their names were responsible (C.T.B., xx1, ii, 440, 474).

<sup>&</sup>lt;sup>3</sup> 2 Geo. II, c. 23. The stipulations of the act were extended to solicitors in 1750; 23 Geo. II, c. 26, which entitled sworn solicitors to become attorneys.

1 December 1730. After that date, no person was to be admitted as an attorney unless he had taken the prescribed oath, and had been duly admitted and enrolled in one of the courts. Before they admitted any clerk, the judges were to 'examine and inquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney'. Clerks were to serve an apprenticeship of five years to an attorney 'duly sworn and admitted', and no attorney was to have more than two clerks at any one time. Attorneys of one court were permitted to sue out writs in another if they had the permission of an attorney of the court to so do, but those attorneys who allowed persons to practise in their names who had not been admitted were to be debarred from practice, and those suing out the writs fined £50. Sworn attorneys were able to practise as solicitors, without paying an additional fee.8 They were obliged to put their names on all writs before delivering them, and were not to begin any action for the recovery of fees until one month after the delivery of their bills. After June 1729, the names of all who were admitted were to be enrolled on lists kept in the respective courts. Nothing in the act was to be held as either requiring or authorising the judges to admit a greater number of attorneys 'than by the ancient custom and usage of such court hath heretofore been allowed'. The act, which was not to extend to the Six Clerks in Chancery, their sworn clerks, cursitors, or to various officers of the courts, was to remain in force for nine years after 1 June 1729.

This act, like it predecessors, and most social legislation of the period, laid down the penalties of misbehaviour, rather than tried to prevent it. It was not part of any wider programme of legal reform, and left all the old temptations and opportunities largely as they had been before. Like all prohibitive legislation, it depended for its success on the willingness of those whom it affected to enforce it. The examination it suggested was too general in character, and depended on the individual judges conducting it, without fees and in addition to their normal work on the bench. It left much to

<sup>2</sup> A suggestion that the period of apprenticeship should be seven, instead of five years, was defeated by 65 votes to 62.

<sup>&</sup>lt;sup>1</sup> I, A. B., do swear, That I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability.'

This act was amended in 1750 so as to allow sworn solicitors to practise as attorneys without paying additional fees, provided they were otherwise deemed well-qualified (23 Geo. II, c. 26, sect. xv).

<sup>&</sup>lt;sup>4</sup> Cf. Joseph Day, An Address, etc. pp. 91-2, on the ineffectiveness of judges for this purpose.

human initiative, and in retrospect, may seem to have been too optimistic for its time. But it was by no means without effect: some influential groups were willing to enforce it, and it provided the basis on which the Society of Gentlemen Practisers did its work from 1739 onwards.<sup>1</sup>

But the malpractices of attorneys did not cease overnight, nor were the critics of the profession silenced. Some, indeed, considered the act as worse than useless, in so far as it allowed too many to enter the profession or to remain in it who were in no way qualified to do so. One of these critics maintained that 'not one out of above six thousand, who before practised as attorneys, but was again admitted to practise, upon the payment of the six pound stamp duty'.2 Another, writing much sooner after the passing of the act, said: 'I am sensible a tiny effort was made in the late act to qualify such Gentlemen for practice, intending perhaps to distinguish between good and bad; but it only discovered, to the grievance and shame of the Nation, that the Numbers were large enough to ruin the four Quarters of the World, however unhappily confin'd to the miserable Portion of Land that makes not a millioneth part of the Whole.'s Both these writers were concerned for the dignity of the profession, and both insisted on making a distinction between the upright and honourable attorney, and the pettifogger. Unfortunately, the act under discussion, and another of the same period,4 had merely detracted from the dignity of the profession, and made it easier than ever before for illiterate and unprincipled men to become attorneys, so that a profession which before 1729 'was held in such estimation that it was no disgrace to a gentleman, or to a vounger son of one higher born, to be bred to it',5 was now despised.

Although there were no further general acts specifically designed to regulate the profession until the nineteenth century, the imposition of an annual licence in 1785, and of a stamp duty on articles of clerkship in 1794, which are perhaps more properly regarded as aspects of Pitt's financial policy, did impose additional and important

<sup>&</sup>lt;sup>1</sup> For this Society, see pp. 20-34 below. The act of 1729 was renewed in 1739, and modified on several occasions.

<sup>&</sup>lt;sup>2</sup> Reflections or Hints...touching the Law, Lawyers, officers, attorneys, etc. (1759).

Dim Sasson, Law Visions; or, Pills for Posterity (1736).

<sup>&</sup>lt;sup>4</sup> 4 Geo. II, c. 26, 1731, laid down the rule that law proceedings should be in English. For another view, see Gentleman's Magazine, February 1733.

<sup>&</sup>lt;sup>6</sup> Reflections or Hints, etc; a similar point was made in the Present State of the Practice and the Practisers of the Law, etc. n.d.

rules on the attorney. And it is significant of an increased concern among attorneys themselves, apparent also from other sources, that many men were ready to interpret them in this way, and to welcome them.

Complaints were made as early as 1689 that attorneys were not specially mentioned in the poll tax acts. They were included in 1694 for the first time, 2 but complaints were now made that attorneys were too leniently treated by the local commissioners. On 28 September, for example, the Treasury Lords rebuked the Commissioners in Cornwall for their neglect in 'wholly omitting, or taxing at only 4s. gentlemen of very good quality and great estates and rich attorneys in great practice...'.3 It was difficult to assess the income of men whose wealth was drawn from so many sources, but it is some indication of the definitive place the attorneys had come to occupy in society that the attempt should have been made. But when the poll tax languished, the attorneys ceased to be directly taxed for their professional incomes.

There had been a kind of indirect tax on the profession since the introduction of the stamp duty on apprenticeship premiums in 1709. But this was at the low rate of 6d. in the f, on sums below f,50, and is. on those above, and, moreover, was not a recurring duty. An annual licence to practice was imposed by an act of 1785.4 Attorneys were to take out an annual certificate of their admission and enrolment in the court in which they practised. In London, Westminster, within the Bills of Mortality, and in Edinburgh, a stamp duty of £5 was to be paid; elsewhere, the tax was £3. Attorneys were to deliver to the court every year a statement of their names, and their usual residences, and the officers of the courts were to maintain a list of all admitted to practice. The penalty for practising without a certificate was £500, and prohibition from practice. This act, unlike that of 1720, was to apply to the Six Clerks and other officers of the courts.5

This act had a mixed reception from the profession. In 1786

<sup>2</sup> 5 and 6 William III and Mary, c. 14, sect. iii.

<sup>&</sup>lt;sup>1</sup> C[alendar of] T[reasury] B[ooks], IX, i, 298. The solicitor-general thought that the current poll tax did not warrant 'the assessing of attorneys for their practice'.

<sup>&</sup>lt;sup>8</sup> C.T.B. XIV, 135, 125. 4 25 Geo. III, c. 8o.

<sup>&</sup>lt;sup>5</sup> In 1792 the tax produced £18,943 (S. Dowell, History of Taxation and Taxes in England, 2nd ed. (London, 1888), III, 14). An annual licence, and a tax on articles were suggested in Proposals Humbly Offered to the Parliament, etc., as early as 1707.

and 1787 petitions were presented to parliament asking for certain modifications, and it was quickly followed by a demand for increased fees.¹ Several of the petitions complained of the unfairness in leaving the conveyancers untaxed, and took the occasion to point out further that very many ill-qualified persons did conveyancing, and suggested that legislation ought to be introduced to prevent this. The Bristol attorneys asked that conveyancers should be made subject to the same laws as attorneys, and also proposed that their own profession should be further controlled by imposing a large duty on articles of clerkship.²

These suggestions were referred to a committee, and in 1794, whether as a result of the petition from Bristol or not, a duty on articles of clerkship was imposed.<sup>8</sup> In February of that year the House was informed of the number of the attorneys in the various courts, and these figures were referred to the committee considering ways of raising the supply.<sup>4</sup> This committee recommended a stamp duty of £100 on articles of clerkship, except in the case of attorneys in certain inferior courts, who were to pay only £50. These rates were increased in 1804<sup>5</sup> (when conveyancers too were obliged to take out an annual certificate), and again in 1815.<sup>6</sup>

The discussion which these new measures aroused seems to indicate a new attitude on the part of many members of the profession towards their calling, and towards their responsibilities to society. Many of the points that were made in pamphlets were anticipated by the speech of William Adam in the House of Commons criticising the measure of 1794.7 He followed Fox in

King's Bench Common Pleas

1791 336 88 1792 190 71 1793 266 71 (Commons Journals, XLIX, 5 Feb. 1794.) 44 Geo. III, c. 98. 55 Geo. III, c. 184.

<sup>&</sup>lt;sup>1</sup> For these petitions, see Commons Journals, XLI, 13 March, 11 June 1786, and 22 March 1787.

The minutes of the Bristol Law Society are missing for these years, so it is impossible to say whether this petition was inspired by it or not. The Yorkshire Society concerned itself with the 1794 act.

3 4 Geo. III, c. 14.

William Adam, 1751-1839, was a nephew of Robert Adam. He was M.P. for Ross-shire, and a member of the English and Scottish bars. He had once fought a duel with Fox, but they had subsequently become intimate friends. He held various offices in North's administration, but by 1794 he was speaking as a member specialising on legal topics, and opposing Pitt on the trials of Muir and Palmer, etc. See D.N.B.

attacking the proposal, and said that he 'considered this tax as exposing the profession to unjust reflections. No persons', he continued, 'were professionally employed in more confidential transactions than the attorneys: they were necessarily entrusted with the secrets of individuals, and of whole families: the character of the profession ought therefore to command respect. Doubtless there were persons exercising it little to their credit, but this was no reproach to the profession itself, which contained as excellent individuals as any class of society. This additional tax', he maintained 'was a heavy incumbrance; as after paying it, together with the foregoing duty for a licence, a man was still liable to be struck off the list of attorneys, were a court of law to judge him unfit for the profession, in which case he lost not only his situation in life, but received no indemnification for the money he had expended in qualifying himself for it. The heads of the law', he concluded, 'and among them were those, the chief justice especially,1 whose endeavours to raise the credit of the profession were well known, would become more averse than ever to degrade attorneys, from the consideration of the ruinous loss with which such a degradation must of course be attended.'2

It was maintained by some who did not welcome the tax that if its object were to raise the revenue, this would not be achieved, since the number of attorneys and of suits at law would thereby be decreased. It was also claimed that the profession was not sufficiently affluent as a whole to be the specific object of taxation.<sup>3</sup> More soberly, perhaps, it was objected by another writer that the tax was inequitable, in that it bore equally heavily on the man with only a small practice, as on 'the great opulent attorney, with 500 suits in his roll, and a dozen clerks at his back'.<sup>4</sup> It was unfair, too, in that the poor man, forced to live in the City where he worked, had to pay the higher rate of the tax, which the wealthier attorney, able to afford a house in the country, might be able to avoid. But

<sup>&</sup>lt;sup>1</sup> Kenyon. <sup>2</sup> Annual Register (1794), pp. 211-12.

<sup>\*</sup> Every honest man in the profession knows, and will publicly declare, that very few attornies or solicitors get fortunes in this age. I declare, upon my honour, I do not believe there are thirty in London who get one thousand ayear; and the greater part can scarce keep their heads above water' (A Word to the Wise; or, a Hint to the Minister, about taxing Attornies, Solicitors, Proctors, etc., by an untaxed Attorney, 1785). Cf. also Charles Ilsley, A Brief Inquiry concerning the origin, progress, and impolicy of taxing attorneys (1804).

<sup>4</sup> Considerations on the Attorney Tax, and proposals for altering and equalising the same, so as to render it easy in operation and just in principle (1786).

he insisted that the tax was not wrong in principle: 'It will not readily be controverted that the profound mazes and intricacies of litigation are the proper objects of taxation; and it is believed, the liberal and considerate part of the practitioners of the law are as much of that opinion as any ministers or set of men whatever.' The tax was only wrong in that it was undiscriminating, and he suggested instead a stamp duty to be paid on each suit carried on, to vary in proportion to the amount of money which was being sued for. This, he said, would be 'something more agreeable, and probably convenient for many, whose external appearance is not irrespectable, to pay it by degrees, than all in one sum. They can, by this means, pay it in a gentlemanly manner, and wipe away the ridiculous aspersion, thrown on the profession, "that LAW, like BEER, is now sold by RETAIL by HIS MAJESTY'S ROYAL ANNUAL LICENCE".'

There were those who defended the tax as being likely to keep undesirable men out of the profession, and maintained that it would probably serve as a most effective supplement to the regulations concerning the profession which already existed, but which were clearly inadequate. It was 'calculated to render the profession more respectable and eventually to cause the members of it to rank higher in the estimation of society, inasmuch as it will have a tendency to drive out of the profession the vile and needy pettifoggers, to whom alone is attributable all the obloquy which the public, for want of a due discrimination, attaches to the whole body'. This commentator believed that attorneys could well afford to pay the tax,2 and suggested that the 'loyal attorney' should not embarrass the government by refusing to pay, but should do so cheerfully, and 'by setting...so good an example to his countrymen...convince them that the obloquy which has long been cast upon himself and brethren, has been unmerited'. It was on the basis of such principles as these that other men were endeavouring at the end of the eighteenth century to regulate the profession from the inside, at a time when state intervention in matters of social concern was still viewed with suspicion.

<sup>&</sup>lt;sup>1</sup> A Defence of Attornies (reasons why they should pay the tax), by a Friend to the Profession (1804).

<sup>&</sup>lt;sup>3</sup> 'Look at our country towns, and see if the best houses are not occupied by attornies—Look at the Habitations of the London solicitors. When entertained at the table of either, do, gentle reader, take the trouble of asking yourself, no matter before or after the cloth is removed, if the means of attornies in general, are not more than adequate to an abstemious mode of living?'

But in addition to these new regulations by parliament, and these more private endeavours, the profession continued to be under the control of the judges in a more minute way. Most of the cases cited in the law reports refer to small points of practice, but there are one or two which have a more general interest. Perhaps the most famous of these was Frazer's Case of 1757, in which the Society of Gentlemen Practisers was concerned. Frazer was an attorney of the court of King's Bench, and had taken as his clerk a turnkey of the King's Bench prison, so that he could be concerned professionally for all the prisoners who needed legal assistance. Since 1755 he had been concerned in sixty-three cases of this kind. Complaint was made to the court, and it was decided that the articles were merely collusive, and they were ordered to be cancelled. The judge gave it as his opinion that 'the exercise of the office of a turnkey in a prison was, both in itself, and also according to the intent and spirit of the act for regulating attornies, a very improper education for an attorney'.1

Blackstone considered that attorneys were 'peculiarly subject to the censure and animadversion of the judges', and it is certainly true that many of them were not always able to resist the temptation to play to the gallery, and score off the attorneys. Jeffreys had set the tone, and it was taken up during the eighteenth century by others, Thurlow, Willes, and Kenyon, for example. Kenyon,

- ¹ Sir James Burrow, Reports of Cases adjudged in the Court of the King's Bench, 30 Geo. II to 12 Geo. III, I (1766), 291; 5 May 1757. For a case in which Mansfield was concerned, see ibid. IV, 2061 (1767). Mansfield was perhaps kinder to the profession than many of his colleagues on the Bench. It was he who was responsible for establishing the doctrine of lien, whereby attorneys could retain their clients' papers as a surety for the payment of their bills (Christian, Short History, pp. 165-6), and who was prepared to acknowledge that the 'part of the profession which is carried on by Attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honour and integrity: And they ought to be protected when they act to the best of their skill and knowledge'.
  - <sup>2</sup> Commentaries, III (1768), 26.
- It was of Willes that Horace Walpole wrote: 'He had a great quickness of wit, and a merit that would atone for many foibles—his severity to, and discouragement of, that pest of society, attorneys. Hence his court was deserted by them, and all the business they could transport carried into Chancery, where Yorke's filial piety would not refuse asylum to his father's profession' (Memoirs of the Reign of George III; quoted Campbell, Lives of the Chief Justices, II (London, 1849), 276). Yorke was the son of a Dover attorney.

<sup>4</sup> For the case of an attorney who retaliated by laying an information against Camden and three other judges for wearing cambric bands in court, contrary to act of parliament, see W. E. H. Lecky, A History of England in the Eighteenth

indeed, according to Lord Campbell, was too often undiscriminating in this matter. 'He encouraged that universal prejudice against attorneys by which I have frequently seen the administration of justice perverted. Although bred in an attorney's office and long aspiring no higher than to be an attorney, he seemed to think the whole order pettifoggers and their occupation almost necessarily disreputable. Instead of restricting his animadversions to peccant individuals', Lord Campbell continued, 'he extended an angry suspicion to a whole class, containing many men as honourable as himself, and much his superiors in education and manners.'1 But some attorneys welcomed Kenyon's concern for the professional behaviour of their colleagues. On one occasion at least he appears to have made just such a distinction as Campbell wanted,<sup>2</sup> and on another he gave judgment in favour of an attorney who complained that he had been libelled by a peer of the realm.<sup>3</sup> The effectiveness of the regulation of the profession by the judges, however, depended to a great extent on the willingness of other people to bring cases of misbehaviour by attorneys into the courts. The activities of the Society of Gentlemen Practisers in this matter will be considered in detail in the chapter which follows.

Century (ed. 1920), VII, 302 and n. 4. There are several cases of the regulation of the attorneys on points of practice in the various law reports of the period. For these, see *Holdsworth*, op. cit. XII, 118-26.

<sup>1</sup> Campbell, op. cit. III, 83; see also Christian, Short History, pp. 161-5.

<sup>2</sup> Cf. Gentleman's Magazine, LXIII, February 1793, 182: 'His Lordship said he believed that the majority of Attornies were honourable men, and of service to the community; but there were many others who were the greatest pests to society. He desired Attornies to take notice that they were bound to give their clients the best advice in their power, and to conduct the causes entrusted to them as if they were their own...' The Pettifogger Dramatized (1797), which was dedicated to Kenyon, insisted on such a distinction, and was prefaced by a quotation from a sermon by the Rev. Jethro Inwood making the same point.

In a speech in the House of Lords on 17 June 1794, the Earl of Abingdon called attention to the immoral practices of attorneys, 'those locusts of the law, the pettifogging Attornies of this country; who, like the locusts in Africa, fall like a cloud upon the earth, and eat up everything they meet with'. He instanced the conduct of one of them, Thomas Sermon of Coney Court, Gray's Inn, who had been employed by himself, and sent his speech to the newspapers for publication. Sermon brought an information against Abingdon for libel in the court of King's Bench. The case was heard by Kenyon, and Abingdon was found guilty, and was sentenced to three months' imprisonment, and fined £100. (Cobbett, Parliamentary History, XXXI, 932-5; Isaac Espinasse, Cases at Nisi Prius in King's Bench and Common Pleas, I (2nd ed. 1801), 225-8; D.N.B.)

#### CHAPTER III

# THE SOCIETY OF GENTLEMEN PRACTISERS

'AT a meeting of the Society of Gentlemen Practisers in the Courts of Law and Equity, held on the 13th February, 1739, the Meeting unanimously declared its utmost abhorrence of all male [sic] and unfair practice, and that it would do its utmost to detect and discountenance the same.' This is the first entry in the minute book of the society, and it seems to indicate that the society had not long been established. There is no information about the events leading up to its foundation. Like most professional bodies in England, it was voluntary in origin, and during the eighteenth century at least, it remained independent of external authority. The scope of existing regulations permitted it to put its first resolution into practice, without being specifically authorised to do so either by the judges or by parliament. For the rest, it was, like many others at this time, largely a convivial society, meeting twice a year to have a dinner, and to hear what the committee had been doing.

In retrospect, of course, the drawbacks of its independence are apparent, and even during the eighteenth century there were those who believed that such a society could not adequately control the profession.<sup>2</sup> But its minutes show a record of activity perhaps surprising to those who believed the attorneys to be wholly devoid of public spirit, or to those who, like Bentham, thought it unrealistic to suppose that they would ever concern themselves with professional morality. So the history of the society is another important sign of the growing concern which some attorneys were feeling about the public status of their profession. And it does not necessarily detract from its achievement that it owed much of its impetus to the realisation of its members—the more affluent part of the profession practising in London—that 'true self love and social'

<sup>&</sup>lt;sup>1</sup> Records [of the Society of Gentlemen Practisers], ed. Edwin Freshfield (London, 1897), p. 1. Holdsworth dealt with the activities of this body in the History of English Law, XII, 63-75, but it seems desirable to deal with it at some length in the present context.

<sup>&</sup>lt;sup>2</sup> See the criticisms of Joseph Day, pp. 31-4 below.

might coincide. Completely disinterested reformers are rare, and are inclined to an idealism which too readily ignores the general temper of the age in which they live. The effectiveness of the work of this society and of others like it was due to the fact that they were swimming with an increasingly powerful tide.

In addition to the two general meetings, held on the day after the beginning of the Hilary and Trinity Terms, it was agreed that a committee should meet once a month to consider how the aims of the society might best be achieved. The officers of the society were a prolocutor, a secretary, and a deputy-secretary who acted as treasurer. At the beginning there were twenty-one committee members, five of whom constituted a quorum.<sup>2</sup> The main burden of the society's work fell on a small number of enthusiasts—so small indeed that the committee meetings had often to be postponed for want of a quorum. From time to time, ad hoc committees were appointed to study special problems, to draw up petitions and memorials, or to convey the thanks of the society to some benefactor. At critical times, the secretary's work could be very heavy, but he received no regular payment, and the office was commonly held by the same man for lengthy periods. On occasion, the society rewarded the devotion of its officers by voting them specific sums. In 1781, for example, 50 guineas were given to Edward Bowman in consideration of his 'long service...and the very small gratuities he had received for his trouble therein'.3

The subscription was fixed at half a guinea a year. In November 1758 it was raised to meet the costs of the society's dispute with the Scriveners' Company. When it had recovered from this heavy drain on its resources, the society began to invest in consols, and thus created a fund from which future needs of this kind, and all unexpected expenses, could be met. Occasionally, however, members were asked for special contributions for particular needs. By February 1810 the society held £1000 3% Consols, yet in July of that year the committee suggested that the subscription should

<sup>&</sup>lt;sup>1</sup> See V. I. Chamberlain, 'The Early History of the Incorporated Law Society', Law Quarterly Review, VIII (1892), 41: 'The usual meeting place was the Old Devil Tavern...a place of resort...frequented by lawyers, who wrote up on their chamber doors "Gone to the Devil".'

<sup>&</sup>lt;sup>3</sup> In order to ensure the attendance of a quorum, the numbers of the committee were increased from time to time, a rota was drawn up, and fines for absence were imposed. See *Records*, pp. 30, 145, 170, and 173.

<sup>8</sup> Records, p. 152.

be increased to two guineas a year 1 'in order to support the credit and respectability of the society, and to defray the contingent expenses lately incurred in protecting and supporting the general interests of the profession, and to make provision for similar expenses in the future'.2

At a general meeting held on 23 February 1742 'it was ordered that all proper and necessary enquiries be made by the Committee to discover any attorneys or solicitors who had been or should be surreptitiously admitted: That every member of the society should use their utmost endeavours to discover and discountenance any such practice, and that the committee should use such ways and means as they should find most necessary to prevent such practices in the future'. In 1752 this resolution was supplemented by the further one which instructed the committee to 'take notice of, and prosecute, at the society's expense, any attorneys found guilty of illegal practices, and every member was desired to give notice to the Deputy-secretary of all such illegal practices as should come to their knowledge'. What the society did on the basis of these resolutions is shown in detail in the minutes.

It was clearly work which could be done more easily for attorneys and solicitors practising in London and the Home Counties. Until communications had improved, and the provincial law societies had come into existence, it was difficult to obtain accurate and upto-date information about the activities of provincial attorneys and their clerks. But by 1802 at any rate, the activities of the society were sufficiently widely known for it to be asked to act against attorneys suspected of unprofessional conduct in Birmingham and in Jersey.<sup>5</sup>

In London, however, the society found much to occupy its attention, and from the start it acted with some vigour and success in controlling admissions to the Rolls, and in bringing instances of malpractice and the violation of the acts governing the profession to the notice of the courts. In 1753, it secured the removal from the Roll of the Court of King's Bench of an attorney who had continued to practice while detained in the Fleet prison, 6 and it was announced in the court that 'the society would at all times be

<sup>&</sup>lt;sup>1</sup> It had previously been raised from half a guinea a year to three guineas payable over two years.

<sup>&</sup>lt;sup>4</sup> Ibid. p. 51.
<sup>5</sup> Ibid. pp. 180, 184.
<sup>6</sup> Contrary to the stipulation of 12 Geo. II, c. 13, sect. ix.

ready, at their own expense, to prosecute attorneys for any unfair practices, and would use their utmost endeavours to detect all illegal practices, and to prosecute attorneys or solicitors who should be surreptitiously admitted'.<sup>1</sup>

One of the most curious cases which the society had to consider was that of William Wreathock, an attorney who had been found guilty of highway robbery, had been transported, and had resumed his profession on his return to England.<sup>2</sup> At the instance of the society, aided by the gratuitous services of three barristers, serjeants at law, Wreathock was struck off the Roll. In 1757 the secretary assisted a member of the society, Samuel John of Lyon's Inn in his appeal to have John Greenwood and John Sliper struck off the Roll, on the grounds that during his period of articles Sliper had acted as 'footman or common servant' to Greenwood. This appeal was successful, and was financed by the society. Again a barrister gave his services free, and Mr John was thanked for 'his laudible zeal in making the said motion for the honour of the profession'.<sup>3</sup> In the same year the society was concerned in Frazer's Case, already mentioned.<sup>4</sup>

In 1775, as a result of the intervention of the society, Robert Simpson was struck off the Roll for having signed the articles of William Hurley, who had, during the period of his alleged clerkship, been employed by Gregory Geering, a member of the society, as his paid servant.<sup>5</sup> In the same year the admission of Laurence Times was prevented when it was shown that he had continued to act as a schoolmaster during his clerkship.<sup>6</sup> A similar charge was brought against John Edkins in 1781, but on this occasion the petition was not successful, and the judge ordered him to be admitted.<sup>7</sup> In 1802 a caveat was entered on behalf of the society against the admission of Richard Gardiner, because it was claimed that he had served an apprenticeship to a grocer, that he had for

<sup>1</sup> Records, p. 65.

<sup>&</sup>lt;sup>2</sup> In 1725 a highwayman, John Everett, had brought a suit for breach of partnership against his professional colleague, Joseph Williams. Their solicitors, of whom Wreathock was one, were both imprisoned and fined £50 for contempt of court. On a later occasion, Wreathock had been convicted of highway robbery and sentenced to death. This was transmuted to transportation, and on his return Wreathock had secured re-admission as an attorney. Cf. Holdsworth, op. cit. XII, 59, and Law Quarterly Review, IX (1893), 197-9.

<sup>\*</sup> Records, pp. 129, 132, 134, 306-8. \* Ibid. pp. 129-31.

<sup>&</sup>lt;sup>7</sup> Ibid. pp. 147-50.

some years held the office of serjeant at mace to the City of London, and that he continued to receive part of the profits of his successor. It was further alleged that he had been accustomed to discount bills and notes for 'necessitous persons', and then to bring actions against the parties to these bills, in which he acted as plaintiff and his master as attorney. The court ordered that his admission should be postponed to allow time for further investigation of these charges.<sup>1</sup>

The society exercised some measure of control over the professional education of attorneys in the ways that have been shown, but it occasionally considered the subject in a more general light. In 1748 the committee suggested that certain clauses should be added to a bill, shortly to be put before parliament, for the purpose of 'more effectually obliging the clerks of attorneys and solicitors to an actual and menial service of their masters, until such time as each of them were regularly assigned over to another attorney or solicitor'.2 In 1751 it expressed its approval of a pamphlet written by John Felton<sup>3</sup> offering suggestions to those who were articled to attorneys, and thanked him for having distributed 'many thousand' copies of it throughout England and Wales. In the following year, as a reward for his help to the profession in this and other ways, the society made him a gift of fifteen guineas.4 In 1807 the committee was considering a proposal to set up another society 'for the articled clerks of members of the society and for the purpose of discussing legal questions under the patronage and direction of the society'.5

From time to time, the society proposed adjustments in the legal system for 'the ease and benefit of suitors'. Among such matters were alterations in the system of giving bail, bills for regulating trials at *nisi prius*, the more effective summoning of juries, the misuse of writs of error by debtors seeking to delay payment, alterations in the laws relating to fines, improvements in the bankruptcy laws and in the management of the Writ of Error Office in King's Bench. In 1783 the society turned its attention to the Court of Chancery, and considered whether it should draw up 'such regulations as may appear necessary for lessening the delays and

<sup>&</sup>lt;sup>3</sup> Friendly Hints to young Gentlemen who are, or intend to be, bound by Articles to Attorneys and Solicitors.

<sup>4</sup> Records, pp. 48, 61-2.

<sup>&</sup>lt;sup>5</sup> *Ibid*. p. 201.

expenses of the proceedings in that court'.¹ It was suggested that the Lord Chancellor might be approached to introduce legislation for this purpose, but these efforts, like those of so many others who sought to reform this court, came to nothing, and it survived almost unscathed until *Bleak House* and beyond.² The matter was dropped and the orders relating to it were expunged from the minutes.³ Many lesser obstacles in the way of an efficient legal service were removed at the society's instigation. The hours of attendance at various law offices were made more convenient, registers of the addresses of attorneys were proposed, and the fees of certain officers in the courts were scrutinised.

The society was always ready to resist the encroachments of other groups on what they felt to be the preserves of attorneys, and, by the same token, to insist on their own right to perform certain functions which others were seeking to deny them. It successfully opposed the application of the Clerks in Court to be admitted solicitors and to take clerks, and protested against their behaviour in refusing to sign certificates and in creating other difficulties.<sup>4</sup> To admit Clerks, it was held, would conflict with the 'intention of the legislature to prevent the undue and unnecessary increase of attorneys and solicitors, and that none should practise as such but persons of character and integrity regularly brought up, and well qualified to act in the profession'.<sup>5</sup>

It was perhaps a sign of the growing self-assurance of the society and of enhanced notions of professional solidarity, that the encroachments of the barristers were equally successfully resisted. In 1761 the committee was ordered to investigate means whereby barristers could be prevented from transacting business properly belonging to attorneys, and decided that the most effective course

<sup>&</sup>lt;sup>1</sup> Records, p. 156.

<sup>&</sup>lt;sup>2</sup> Bleak House did not begin to appear until 1852, but the Lord Chancellor described is generally assumed to be Lord Lyndhurst, so that the action of the story must take place about 1827, the period following the report of the first Chancery Commission, described by Holdsworth as 'the very worst period of the Court of Chancery' (W. S. Holdsworth, Charles Dickens as a Legal Historian (Yale University Press, 1928), p. 79).

<sup>&</sup>lt;sup>8</sup> The society also dropped an attempt to get Masters in Chancery to attend in the afternoon when it was shown that some attended longer in the morning, and that 'others were so infirm that they could not attend in the afternoon (especially in the winter season)' (Records, p. 134).

<sup>&</sup>lt;sup>4</sup> *Ibid.* pp. 9, 13, 14, 16. For a summary of the orders in Court relating to the Six Clerks' Office, and a list of the objections made by the society on these occasions, see pp. 295-302.

<sup>5</sup> *Ibid.* p. 300.

would be to prosecute individual cases as they occurred.¹ In 1800 it was reported that certain barristers were receiving clients and transacting their business without the intervention of an attorney, and it was resolved that 'such practices were highly improper, and ought to be discountenanced by the Society and the profession at large'. Copies of this resolution were sent to every member of the society 'in order that the sense of the meeting may be fully known, as a means of preventing in future a practice highly prejudicial to the interests of attorneys and solicitors'.² The society was also concerned to prevent conveyancers practising as attorneys.³ From the opposite point of view, it endeavoured to break into the monopoly of the business connected with the soliciting of private bills in the House of Commons which the clerks of the House were seeking to keep to themselves.⁴

The most prolonged dispute of this kind in which the society was involved on behalf of the profession was that with the Scriveners' Company of London. The Scriveners, wanting to secure a monopoly of conveyancing business for themselves, tried to insist that attorneys and solicitors doing conveyancing in the City of London should become free of their company. The society denied the right of the Company to insist on this, and the dispute, fought out in several test cases in the Lord Mayor's Court, went on during the whole of the period 1749-60. Individual members were prosecuted by the Scriveners, and their defence was organised and paid for by the society. The expenditure of money and energy which the society was prepared to make in this affair is a striking indication both of the strength of professional feeling, and of the fact that conveyancing had now become recognised as one of the most important parts of the attorney's practice. And the additional fact that distinguished barristers were willing to represent the society in these disputes without retainers or fees, suggests that they realised that their interests were being threatened also, and that there were many points at which the interests of the whole legal profession coincided.<sup>5</sup> Besides, the threat was only local—though in a most

<sup>&</sup>lt;sup>1</sup> This at a time when the society was presenting plate to those barristers who had given their services free in the dispute with the Scriveners' Company.

<sup>2</sup> Records, pp. 173-4.

<sup>3</sup> Ibid. pp. 180-3.

<sup>&</sup>lt;sup>4</sup> The minutes end before the successful outcome of this matter; business of this kind eventually fell to barristers (*Records*, pp. xci, 221-2). See also O. C. Williams, *The Clerical Organisation of the House of Commons* (Oxford, 1954).

<sup>&</sup>lt;sup>5</sup> As Fletcher Norton said in his speech on behalf of the attorneys: 'This is the case of the whole profession of the law...it is not only the profession of attorneys that is involved, but all the Serjeants at Law' (*Records*, p. 263).

important locality—and no insuperable constitutional or financial barriers were erected by the Scriveners to keep attorneys out of the Company, and hence deprive them of the right to do conveyancing. The Scriveners' Company was anxious to gain members, and the admission fees required were small. It seems, therefore, that what impelled the attorneys to engage in this prolonged litigation was a highly developed sense of professional prestige and solidarity in face of an attack which may have appeared impudent rather than dangerous.

The actions which were fought were based on a by-law of the City 'That no person not being free of the City of London, or any other employed by him, is to exercise any art or mystery whatso-ever in the said City'.¹ Because of this, they were heard in the Lord Mayor's Court, before the Recorder. The attorneys tried without success to challenge the authority of this court to judge the question, and to get the action removed to King's Bench. In spite of this rebuff, however, the attorneys went on, and in 1760 the issue was decided in their favour.²

From the Scriveners' point of view, the affair looks like a desperate attempt to retain a monopoly in a type of business from which they derived much of their profit, and it represents the efforts of an old-established and decaying corporation to resist the latest—and perhaps the most serious—attack on its position. As a witness at the trial remarked: 'It was said that the Company was thrown into very great straits, and therefore must make use of this means to recover itself.'8 The Scriveners seem to have been more successful in their dealings with other groups, the Notaries, for example, but the future lay with professional groups of another kind. Others besides the attorneys seem to have been reluctant to join the City Companies at this time. They were sufficiently prosperous to do without the privileges, and anxious to avoid the inconveniences and petty restrictions which membership might impose. It was bodies like the Society of Gentlemen Practisers itself that men were beginning to want and to create, bodies in which efficiency counted for more than antiquity of foundation. And, as Mrs George com-

<sup>1</sup> Records, p. 247.

<sup>&</sup>lt;sup>2</sup> The report of the trial is in *Records*, pp. 246-86; a separate account was published in 1769.

Records, p. 277; see also Holdsworth, op. cit. XII, 70-1.

<sup>&</sup>lt;sup>4</sup> Cf. E. R. Samuel, 'Anglo-Jewish Notaries and Scriveners', Transactions of the Jewish Historical Society, XVII (1951-2).

ments, 'The City's ceremonial...had become antiquated, but not yet historically interesting'.1

One of the obvious ways in which such a society could demonstrate its usefulness to the profession was by securing improvements in the conditions of employment, and the society proved itself in this respect by initiating a successful appeal to have the fees of the profession increased. In 1798 the committee decided to submit a memorial on this subject to the Lord Chancellor and the Master of the Rolls, pointing out that their fees had been fixed 'upwards of a century ago when the value of money was such as rendered the then allowance adequate to its purpose, but that the personal and particular imposts laid on the practisers within the last few years and other causes, render an increase of their fees absolutely necessary'.2 This was not accomplished overnight. Both the Lord Chancellor and the Judges thought that it lay beyond their power to grant such an increase, though they were all agreed that it was desirable, and it was not until 1807 that Erskine, during his brief period as Chancellor, granted an increase of fees in his courts.3 Fees in the common law courts were not increased until three years later, and then not to the extent that the society thought desirable, and when the minutes end, a further petition to parliament was being considered.4

Whatever their earlier attitude may have been, at this period the judges seem to have heard these petitions with sympathy, the more so there can be little doubt, because they were presented by such a society. The barristers, too, who early in the century had often adopted a somewhat haughty attitude towards the attorneys, had, by its end, become more respectful. It was a respect based as much on a nice appreciation on both sides of their mutual interests, as well as on more high-sounding ideas of professional solidarity, and it was made easier for the barristers by the improvement in the status of the attorneys since 1700. The attorneys were becoming increasingly sensitive about their public reputation, and the society

<sup>&</sup>lt;sup>1</sup> M. D. George, London Life in the Eighteenth Century (London, 1951), p. 3 and note 4 (p. 323). See also J. R. Kellett, 'The Breakdown of Gild and Corporation Control over the Handicraft and Retail Trade in London', Economic History Review, 2nd series, x, 3 (1958), pp. 381-94.

<sup>&</sup>lt;sup>a</sup> Records, pp. 163-4.

<sup>&</sup>lt;sup>3</sup> On 3 July 1807, the society resolved that 'Lord Erskine' should be a standing toast at its dinners, as a token of its gratitude to the Chancellor (*Records*, p. 205).

<sup>4</sup> *Ibid.* p. 228.

was ready to demand apologies on behalf of any members who thought themselves shabbily treated by a member of the bar. In 1748, for example, it took up the case of Thomas Nuthall, one of its members who considered that his professional reputation had been wrongly impugned by a note placed in the Retainer Book of a barrister, Hume Campbell, to the effect that no more briefs were to be accepted from Nuthall. Campbell replied at some length to the representations made on Nuthall's behalf, and blamed the entry on the officiousness of his clerk. He concluded his explanation by expressing his 'hearty wishes for the prosperity of the Society, declaring whether in or out of parliament he would in all places and at all times be ready to serve the Society in the best manner he was able, not only as bound in point of gratitude, but that he considered the worthy part of the profession, whether attorneys, solicitors, or counsel, as one body'.2

He evidently kept his word, for six years later it was announced that on his retirement from the bar he had been replaced as counsel for the society in its dispute with the Scriveners by Fletcher Norton, another barrister of distinction. Fletcher Norton, too, served the society well, and, with the aid of the attorney- and solicitor-general, brought this action to a successful conclusion.<sup>3</sup>

In 1766 an eminent barrister who had spoken in disparaging terms of attorneys was quickly brought to heel by a resolution of the society that 'any counsel...making use of suchlike reflections upon the attorneys in general ought not to be employed by any member of the society'. He sent a very full apology, and made further amends in a similar statement made in open court, and later by giving his services free to the society in their attempt to have one Robert Simpson removed from the Roll. Once the tradition had been established which forbade barristers from dealing directly with clients, they found they could no longer afford to indulge in the common sport of abusing attorneys. The society even objected to rulings of the Inns of Court which were thought to

<sup>&</sup>lt;sup>1</sup> Chatham's attorney was called Thomas Nuthall; see pp. 80-1 below.

<sup>&</sup>lt;sup>2</sup> Records, pp. 32-3.

<sup>&</sup>lt;sup>8</sup> The society presented Norton and his juniors with plate to mark the victory.

<sup>&</sup>lt;sup>4</sup> Serjeant Davy was alleged to have told a jury: 'You gentlemen who are on the outside of the curtain do not see the tricks and management within; we that are on the inside see the whole, and I will take it upon me to say, that out of the many mistakes that happen in the management of causes, 19 out of 20 happen by the ignorance of attorneys' (Records, p. 114).

<sup>&</sup>lt;sup>6</sup> Ibid. p. 132. Davy's apology is printed in full, pp. 114-15.

be harmful to attorneys. In 1763, for example, a lengthy statement was prepared objecting to an order of the Benchers which prohibited attorneys and solicitors from being called to the bar for two years after they had ceased to practice. There was a case, too, in 1809, in which the society protested against the admission to Gray's Inn of one William Harwood, who in their opinion was 'not duly qualified to act as a solicitor. This is unusually late for a solicitor to be admitted as a member of an Inn of Court, but the abrupt end of the minutes leaves the details of the case unknown.

The society also served the profession by scrutinising proposals for legislation which would affect attorneys, and by providing a central agency through which petitions and memorials could be presented to parliament. In 1740, for example, a bill 'for regulating trials at nisi prius and for the more effective summoning of juries' was considered, and at the next meeting 'a deputation was appointed to attend the gentlemen in the House of Commons who had the bill under consideration, and to give them their assistance in settling the bill'.3 In the following year, the committee considered the Land Tax bill which was before parliament, and attempted to have those clauses removed which prevented attorneys and solicitors from acting as commissioners. The Speaker, the Lord Mayor, and the members for the City of London were all approached on the society's behalf.4 In 1742 the situation was reversed when a member of parliament asked the help of the society in preparing a bill for the easier recovery of small debts. The existing laws on this matter were a subject of constant complaint, and it was commonly thought that the attorneys had a vested interest in preserving

<sup>1</sup> Records, p. 111.

<sup>&</sup>lt;sup>2</sup> Ibid. pp. 214-15. William Harwood (Horwood), aged 29, son of Thomas Gee Harwood, yeoman deceased; admitted 2 December 1808 (*Gray's Inn Admission Register*, p. 411).

<sup>\*</sup> Ibid. pp. 2-3.

<sup>&</sup>lt;sup>4</sup> Ibid. pp. 6-7. Cf. W. R. Ward, The English Land Tax in the Eighteenth Century (Oxford, 1953), p. 88. Dr Ward notices a decline in the social status of the commissioners by this time, and quotes Hardwick's taunt that they were 'Some of the lowest people of any kind of property in the kingdom'. He adds 'Attorneys, who might have helped, were often excluded from the boards "because if they were let into the management of other people's property, they would be sure to set them together by the ears" (Hist. MSS. Comm. Egmont Diary, 1, 87). This remark was made apropos of a clause which was to be added to a bill for erecting a workhouse at Worcester to the effect that 'No attorney shall be capable of being elected, or of acting as, a Guardian of the Poor in the City of Worcester'. Sir Joseph Jekyl (whose wife's family included attorneys) protested against this as a 'reflection on an honourable profession'.

their complexities and absurdities. The society, however, even at this early stage in its history, resolved to give what help it could, and thanked the member for 'the mark of his regard for them'.¹ In 1747 it considered an application to parliament to revive several recent acts on the matter of vexatious arrests,² and in the following year applied to the standing committee on expiring laws to have the acts regulating the profession continued.³

Lastly, the society performed many acts of benevolence and charity to distressed members of the profession and their families. In 1778 Mrs Colston, widow of John Colston and mother of two children, applied to the committee for relief. Colston had been a member of the society and had 'rendered great service' during its dispute with the Scriveners' Company, for which he had not been recompensed. In recognition of this, his widow was given twenty guineas to alleviate her distress.4 In 1806 Thomas Searle wrote saying that for the last twenty years he had been afflicted with a disease which had compelled him to give up his partnership with another solicitor, and had made it impossible for him to receive clients. He had, unwillingly, been forced to seek the aid of the society, having in the past been helped by several members individually. 'To whom', he wrote, 'can I so properly apply as to those of my profession who by the blessing of God having had their health and abilities continued to them, have with honour to themselves and benefit to their fellow-creatures been raised to states of independence and affluence.'5 It was decided to leave members to contribute to Searle's relief if they thought fit; the secretary was to collect the donations, and employ them as he should judge best. In the following year it was suggested that a fund should be established 'for the relief of decayed members of the profession, their wives and children', but there is no record of what came of this proposal.6

In spite of this striking record of professional and charitable service to the attorneys, the society was not without its critics. The most energetic and voluble of these was Joseph Day, an attorney,

<sup>&</sup>lt;sup>1</sup> Records, p. 8. <sup>2</sup> Ibid. p. 25.

<sup>&</sup>lt;sup>8</sup> Ibid. pp. 29-31. The society frequently applied to have indemnifying acts passed for the benefit of attorneys who had neglected to perform certain duties in the statutory time.

<sup>4</sup> Ibid. p. 139.

<sup>&</sup>lt;sup>6</sup> Ibid. pp. 193, 196. For a similar petition, see ibid. pp. 321-3.

<sup>6</sup> Ibid. p. 205.

who devoted much time and trouble to attacking the society, and making proposals for establishing another, more efficiently organised, and officially sanctioned. The point at which he attacked it most vigorously—that it was independent in origin and voluntary in membership—was that at which it was probably most vulnerable. But while it is true that the society represented only part of the profession, it might be replied with equal truth that Day represented only himself.

He maintained that a society constituted as this one was must be inadequate.

Scarcely a day passes during any term [he wrote] without complaint to some of the courts against one or more attorneys; the censures passed, and the punishments inflicted neither tend to prevent a continuance of the numerous and serious evils with which the lower and unprincipled members of the profession torment society, nor in the smallest degree diminish the vast load of obloquy, that has long been attached by public prejudice to the general body of practitioners.<sup>2</sup>

This may have been true, and it is a view expressed by others,<sup>3</sup> but it was something at least that the complaints were made—many of them by the society itself—and their number might also be interpreted as evidence of an increased concern for the behaviour of the profession. Both in its origin and in the methods by which it proceeded, the Society of Gentlemen Practisers was more typical of eighteenth-century society and government than that which Day proposed to establish in its place, but it is to his credit that when the Law Society was founded in the nineteenth century, its constitution bore striking resemblance to that which he had advocated thirty years earlier. But in the meantime, it was hardly fair to blame those making complaints about the behaviour of attorneys if the disciplinary action taken in consequence was not sufficiently severe.

Details of his criticisms of the society and of his efforts to create a substitute for it are contained in two pamphlets written by him, An Address [to the Attorneys at Law and Solicitors, etc.] (1796); and Thoughts [on the Necessity and Utility of Examinations, etc.] (1795).

<sup>&</sup>lt;sup>2</sup> An Address, pp. 11-12.

<sup>&</sup>lt;sup>8</sup> Cf. A. Grant, *The Progress and Practice of the Modern Attorney*, etc. (1796). 'It is a truth...that while the officers of the sheriff of Middlesex are more respectable now than formerly, the pettifogging tribe of attornies have not only increased in numbers but in infamy.'

Yet, although Day appears to have underestimated the effectiveness of the society, and to have been as ready to discern selfish motives behind their conduct as they were to see them in his own, there was probably some truth in his claims that only a society which was officially authorised to govern the profession, to which all attorneys would belong, and which would conduct a rigorous examination of their qualifications, would be sufficiently powerful to perform the Herculean task that confronted it. What he proposed was a Royal College of Attorneys and Solicitors, similar to that of the surgeons and physicians. It would be established by royal charter, and entrusted with the task of examining and governing the profession. Its governors would include the Lord Chancellor, the judges, and the Master of the Rolls, and they would be assisted by the attorneyand solicitor-general and other senior barristers. This board would appoint examiners who would award a certificate. Day further suggested that a library should be established, lectures given, and a register of practitioners maintained. Membership of such a society as this would clearly mark off the upright and honourable attorney from the pettifogger, and guarantee to his client a certain standard of professional competence and behaviour.

According to Day, many distinguished legal figures supported this plan. But attorneys, and the Society of Gentlemen Practisers, objected that it placed the profession under external control, and gave the impression that it was incapable of ruling itself. To Day, however, only a society constituted in the way he suggested would have the appearance of dignity and impartiality that was necessary if the public was to be brought to respect the profession. 'Incorporating the attorneys', he maintained, 'would create a marked distinction and oppose an insurmountable barrier against the host of evils which daily assail the really respectable practitioners from the misconduct of those of another description.'

The society was not convinced. It paid scant attention to his advances, and even suggested that he wanted to create such a college mainly in order to become its first secretary. But Day was not easily discouraged. Thurlow, Kenyon, the king himself, were told of his plans. George Rose assured him that the government would support the necessary bill if it were backed by the judges. It was all in vain. The society would have none of it, and Day's plan fell through. It voted him substantial sums for his expenditure

<sup>1</sup> Day, An Address, p. 173.

of time and trouble, but he was not to be mollified. 'But the die is cast', he wrote, 'I have promised acquiescence, and I will honestly keep my word. I now see that there are interests to combat, which, though formidable, would perhaps not be unconquerable; but I will submit, and not oppose them.'2

Day's professed aims, and those of the society, were closely akin. Both were concerned to distinguish the respectable attorneys from those of another complexion, but Day's proposals would have created an institution which in the scope of its work and in the social ideals it embodied went far beyond those of the type represented by the Society of Gentlemen Practisers. The present Law Society, which performs many of the functions which Day planned for his own, was founded in 1825. The minutes of its predecessor end in 1810, and those who founded the new society apparently conceived of themselves as founding a new society, not as reviving an earlier institution. This is surprising, for the older body had been influential and respected, and it is strange that it should have been forgotten. The new society was given a royal charter in 1831; in 1832 it possessed a library of more than a thousand volumes; in 1836 the first examination of articled clerks was held under its auspices.3

Attorneys and solicitors, however, never attained that degree of independence accorded to barristers. The new society, like the old, was in essence an instrument for putting into effect parliamentary regulations concerning the profession. In accordance with new social ideals and in answer to more pressing social needs, the powers given it were such as its increased jurisdiction demanded. But for its successful working, it depended on a spirit of professional pride and social responsibility such as that which had brought the Society of Gentlemen Practisers into being, and enabled it to perform its most useful work, in an age with which these qualities are not usually associated.

<sup>&</sup>lt;sup>1</sup> He was given £98. 18s. 8d. for his expenses in this matter, and £100 for his trouble. Day is not mentioned in the published minutes of the society.

<sup>&</sup>lt;sup>2</sup> Day, An Address, p. 182.

<sup>&</sup>lt;sup>3</sup> See E. B. V. Christian, A Short History of Solicitors, pp. 176 et seqq.

#### CHAPTER IV

## THE PROVINCIAL LAW SOCIETIES

Membership of the Society of Gentlemen Practisers was, as has been shown, practically restricted to attorneys in London and the Home Counties, if only for the reason that they alone would be able to attend its meetings. This, indeed, was an objection raised by Joseph Day in his attack on the society. But it is true that the cases of malpractice dealt with by the society were not restricted to those which occurred in London, and further, that it scrutinised the entire lists of those seeking admission to the Roll at the beginning of each Term—though here also, the difficulty of obtaining reliable information increased with the distance from London, even if it was mitigated by the development of the practice of every country attorney having a London agent.

Yet this was a private society, owing its existence to the initiative of a few men in London, and the development of the provincial law societies took place independently of it. So far as can be seen, there was no formal connection between them and the London society in the early stages of their existence. During the period up to about 1830, indeed, there were occasions when the provincial societies seemed to resent the increasing importance and presumptions of the London society. But it seems likely-and the records of the Yorkshire Law Society amply support the impression—that when the interests of the profession were at stake, provincialism would give way to professional solidarity. It is probable that the provincial societies, like the Society of Gentlemen Practisers itself, can in origin best be regarded as examples of a phenomenon that was common enough in the eighteenth century—groups of men with common interests meeting together for reasons that were primarily social and convivial, and finding that collectively they were able to do things for their common benefit which as individuals they were unable to accomplish. And, as the secretary of the Manchester society told the Select Committee on Legal Education in 1846: 'These Societies are altogether voluntary, and have originated from the zeal and exertions of a few respectable individuals."

<sup>1</sup> Reports, Committees (1846), x, xvi.

In addition to those bodies which are to be described, there were apparently others even more informal in character, such as that which met at King's Lynn in 1797 to draw up a list of conveyancing charges, and the meetings of the Northern Agents mentioned by William Hodgson at the end of the century.<sup>1</sup>

There are four provincial law societies which were founded in the eighteenth century: Bristol, founded in 1770, Yorkshire in 1786, Somerset in 1796, and Sunderland in 1800.<sup>2</sup> Between 1800 and 1825 fourteen were founded: Leeds in 1805, Devon and Exeter in 1808, Manchester in 1809, Plymouth in 1815, Gloucester in 1817, Birmingham, Hull, and Kent in 1818, Bolton and Newcastle upon Tyne in 1826, Liverpool in 1827, Carlisle in 1831, Preston in 1834, and Dorset in 1835. It is not surprising that Bristol should be the first city outside London to have its own law society, nor that Yorkshire should follow it, when it is remembered that it was from Yorkshire that the first moves came which culminated in the act of 1720.8 And it was to be expected also that such centres of growing size and importance as Leeds, Manchester, Birmingham, Newcastle, Liverpool, and Hull, would early support their own law societies. It is interesting that there is no immediate connection between these early societies, nor are they the result of any pressure exerted by the judges or by the London society. This, and the similarity of their early histories and functions, lends some support to the view suggested elsewhere that it was during the latter years of the eighteenth century, and the early years of the nineteenth, that ideas about professional conduct and professional solidarity began to be common and important, calling for societies like these to express and implement them.

The Bristol Law Society was apparently founded in 1770, but the minutes which survive do not begin until 1774, and there is an unfortunate gap for the crucial period 1780–1819. It may even be the case that the society expired shortly after 1780; a letter of 1814 seems to suggest that there was no society in existence then, and

<sup>&</sup>lt;sup>1</sup> Some sort of arrangement must also have been available to arrange for the presentation of a petition of 1169 attorneys protesting against a threatened prosecution for infringing the laws relating to Stamp Duties (*Calendar of Treasury Books*, xxx, ii (1706–7), 440; 16 September 1707).

<sup>&</sup>lt;sup>3</sup> This date is not claimed by the existing Law Society in Sunderland, but it is given by other authorities.

It was in Yorkshire that the first Land Registry was set up, at Wakefield.

another of 1805 advocates the setting up of a law library, apparently in the absence of any other comparable organisation.<sup>1</sup>

The minutes from 1774 to 1780 give the impression of a society interested almost exclusively in social activities. The rules were revised and printed in 1774, and begin: 'Whereas divers attorneys at law and solicitors in chancery, did in the month of October in the year 1770 upon consideration of the many advantages which might arise from a regular and well ordered association of the practisers of the laws of this realm, form themselves into a society, which has continued from that time to the present to be held at the Bush Tavern in Corn Street, Bristol....' The society was to include barristers as well as attorneys and solicitors. It was to meet for dinner every second Tuesday, and on the first and last days of each Term. There were fines for non-attendance, and for the infringement of the rules such as that which forbade dice, cards, and betting. Eight members attended the first meeting mentioned in the minutes, and the number continued to be fairly small.<sup>2</sup>

There are only a few indications that the society was anything other than a social one. In July 1775 new regulations were adopted 'as to the manner of stating and debating law questions in this society'. At the same meeting it was suggested that £5 be paid out of the society's funds towards the cost of the funeral of an attorney, William Edwards. This proposal was not agreed to, but it was agreed that 6s. 3d. should be paid to the landlord of the Bush who had supplied Edwards with certain provisions during his illness. From time to time law books were bought for the use of members, but these can never have been very numerous, for they were kept along with other records of the society in a single chest locked by three keys, and in July 1775 a proposal that Viner's Abridgement of the Law should be bought was dropped because the proposer did not turn up at the meeting at which the matter was to be discussed. In January 1776, 20 guineas were subscribed to the fund raised in Bristol for the relief of soldiers, widows, and children who had suffered 'in the prosecution of the measures lately adopted by Government against rebelling North Americans', and in January 1778, £50 was given to the fund for raising men in support of

<sup>&</sup>lt;sup>1</sup> The present secretary of the Bristol Law Society kindly arranged for me to see these records.

<sup>&</sup>lt;sup>2</sup> The Law List for 1777 gives the names of 35 attorneys in Bristol; that for 1790, 61. The Bristol Directory for 1794, 72.

the 'constitutional authority of Great Britain over her rebellious colonies in America'.¹

The society's money was invested in turnpike tickets until March 1778, when they were sold and the money invested in the funds. Occasionally also shares in state lottery tickets were bought for the society. There does not seem to have been a great deal of enthusiasm for the society; on more than one occasion a quorum was not present, and on 14 May 1776 it was recorded that 'The president and most of the members being engaged at Gloucester in the Election not one member was present at this meeting'.

There seems to have been no organised body of attorneys in Bristol during the period 1780–1819. A printed circular of December 1805 mentions that a meeting had been held to discuss the setting up of a law library, and asks attorneys to join. Another circular of 21 November 1814, signed by Arthur Palmer of the Sheriff's Office in Bristol, asks attorneys to attend a meeting to discuss 'a communication from a committee of respectable solicitors [in London] on the subject of an application by the profession to the judges of the Courts of King's Bench, Common Pleas and Exchequer respecting the present practice in the taxation of costs', and commends the proposals as being 'calculated for the benefit of the public, and to secure the respectability of the profession'. This letter, with its reference to the London Society, the taxation of costs, and the respectability of the profession, is the first definite sign of a specifically professional feeling among the attorneys in Bristol.

The minutes of the Law Library Society begin in 1819, and extend to 1870 when the Bristol Incorporated Law Society was founded. There was an admission fee of five guineas, and an annual subscription of two guineas; articled clerks were to pay two guineas a year. The minutes are entirely concerned with the administration of the library and the ordering of books.

The survival of an interesting minute-book recording the foundation and early history of the Yorkshire Law Society makes possible

<sup>&</sup>lt;sup>1</sup> It is hardly surprising that Bristol attorneys should be so ready to support the government. In May 1778 an attorney who had joined the Somersetshire Militia 'for the laudable purpose of serving and protecting his country', and who wanted to maintain his connection with the society, was deemed to be a non-resident member. Perhaps the tavern bill of 31 September 1776 contains a further example of this patriotic zeal: 'pd. for British Herb Tobacco, 1/3.'

a detailed study of its activities during the period 1786-1834. In March 1786 the attorneys and solicitors attending the Assizes at York were invited to attend a meeting to be held at Mr Ringrose's, which was to consider the heads of a bill to be presented to parliament for regulating persons practising as conveyancers—another sign of the importance attached by the profession to this branch of its activities—and to consider a plan for holding regular meetings in the future.

This meeting took place on 21 March, and was attended by forty-one attorneys from all over Yorkshire, some from Durham, and two from London. It was decided that 'as many Gentlemen were of the opinion that such meetings would be of public utility and productive of useful regulations', regular meetings would be held at York every Tuesday evening during the week of the assizes. The rules and aims of the society were formulated in August 1786. It was resolved

That the principal objects of this society shall be to preserve the privileges and support the credit of attorneys and solicitors: to promote fair and liberal practice and prevent abuses in the profession: and to adopt such measures as may appear best calculated to effect these ends and most likely to secure respect to the profession and to be of advantage to their employers.

The company of all the attorneys and solicitors attending the assizes was invited, whether they were generally resident in the county of York or not: members from outside would be considered as honorary members for the occasion of the assizes. There were to be a president, a vice-president, a secretary, and a treasurer. The annual subscription was to be one guinea, with an entrance fee of one guinea. Meetings were to take the form of a supper, and whatever money remained after the expenses of these meetings had been met was to be devoted to such purposes as the majority of members should think fit.

Throughout these years the society paid a great deal of attention to questions affecting the interests and dignity of the profession. It was to protect their interests in the matter of conveyancing that

<sup>&</sup>lt;sup>1</sup> This minute book was made available for my use by the present secretary of the society.

<sup>&</sup>lt;sup>2</sup> Ringrose's Hotel, Little Blake Street, 'a fashionable place, frequented by the nobility of the period'.

<sup>&</sup>lt;sup>8</sup> All quotations are from the minute book of the society.

they had met in the first place. It was resolved that this bill should be opposed, and the chairman, Mr Townend, town clerk of York, was instructed to communicate this decision to the 'solicitors employed on behalf of the profession in London'. Accordingly Townend sent them a copy of the resolutions passed by this 'respectable meeting of attorneys'. The society objected to the bill for a variety of reasons. It was felt that it would increase the number of conveyancers who were not admitted attorneys, opening to them 'the most profitable and agreeable part of the employment now transacted by attorneys'. It was unfair to demand that attorneys should be articled for five years, while conveyancers were allowed to qualify in three, and unreasonable to put attorneys to the trouble and expense of procuring new admissions and further examination 'as to their fitness in that business which they have practised for years'. It was objected that the

clause restraining attorneys etc. from holding courts and drawing surrenders would be prejudicial to the profession in the highest degree and would occasion great inconvenience and a heavy and unknown expense in those parts of the country where small copyhold estates are daily passing from one to another, in some places at the distance of forty or fifty miles from the residence of a barrister, and besides there are not more than three or four courts held by barristers throughout this county whereas some attorneys are stewards of, and hold to the number of twenty or thirty. This would therefore effectually introduce barristers into family business, and by making their clerks admitted conveyancers would enable them to do all the best business now transacted by attorneys.

He concluded by hoping that 'these reasons would have weight with the profession in town, and induce them to prevent a measure so certain to prove detrimental to country attorneys', and asked that a copy of the bill should be sent to him if the business should be proceeded in.

In the following year the society approved the terms of another bill on this subject, with the significant proviso that a clause should be added 'to prevent clerks to counsel employed in any capacity as menial servants during their time of service from being admitted conveyancers, although duly articled pursuant to the directions contained in the said bill'. The Yorkshire attorneys were willing that further restrictions should be placed on the profession for the sake of its increased prestige, and recommended that additional duties should be placed on articles of clerkship, and that the system of taxing costs should be improved.

In 1794 the society suggested amendments in the proposed bill to increase the duty on articles of clerkship and admission fees, but later dropped it when the stipulations of the bill became better known, and when it was discovered that the bill was not being opposed either by the London attorneys or by any others. Ten years later, in 1804, on learning that another increase was proposed in the duties on the profession, the society set up a committee to draft a petition for an increase in fees, which was to work with the London society, and any others that might be interested. The secretary wrote to the London society on 19 July asking for more detailed information about the proposed bill, and to assure him that 'the Yorkshire Law Society will very cheerfully join in any measures that may tend to preserve the interest, respectability, and independence of the profession'.

There were other occasions when the society acted in complete accord with the London society. In 1804 Charles Frost submitted a memorial to the president of the Yorkshire society pointing out the hardships which were often incurred by those seeking the recovery of small sums, owing to the inequitable system of taxing costs.

When a sum of £20 or £30 only is withheld from a person however unjustly it is impossible for any gentleman of the profession conscientiously to advise him to have recourse to the remedy which the law would seem to afford him for the recovery of his due, as the difference between the costs of the suit, and the costs for which on taxation he would be entitled to call upon his opponent would generally speaking, be more than the amount of his debt.

The profession of the law is consequently brought into disrepute and its practitioners whose respectability ought to have every encouragement and support are subjected to the odium of having consumed by exorbitant charges the sum the verdict of a jury had awarded to be the just right of the successful suitor....

Frost was thanked for his concern for the profession, and the society agreed to his suggestion that a memorial should be presented to the judges. In this the judges were told that the society consisted of 130 'of the most respectable attorneys and solicitors practising in Yorkshire', and that its aim was 'the correction of abuses and the promotion of liberal and honourable practice in the profession'. After mentioning that several recent acts had added to

the financial burdens on attorneys, the memorial declared that 'effectually to maintain the respectability of the profession so important to the general interests of the country, it is requisite that every branch of it, but particularly that to which your memorialists belong, should be rendered perfectly independent and superior to every temptation'. It was pointed out that the fees of barristers had been raised, while those of attorneys had not, and it was claimed that the memorial was inspired more by a sense of justice towards the country at large than by a concern for the pecuniary interests of attorneys. Their legitimate rewards must be such as to raise them above the temptation to pervert the law to their own ends. Copies of this resolution were sent to the presidents of the other law societies in existence. In the end the fees were raised, and the London society was formally thanked for its exertions, and its Prolocutor, John Kayes, was elected an honorary member of the Yorkshire society.

In 1819 the society expressed its approval of the attempts which the London society made to keep undesirables out of the profession. It was resolved

That to promote this laudable object the secretary of this society be instructed to write immediately on the receipt of every communication from the secretary of the London Law Society with the names of persons applying for admission, and with a copy of the resolution of the London Law Society now read to such members of this society as live at or near the places where the persons so applying for admission shall have served their clerkships.

There were many other matters to which the society gave its attention. Its funds increased, and from time to time substantial sums were invested in the consolidated annuities. In July 1815 the annual subscription was raised to two guineas until such time as the society should hold £1000 worth of this stock, a position which was reached by July 1819. The society made frequent charitable gifts to needy members, or to their widows and young children. The usual method was that a certain sum was handed over to a member who knew the case in question, for him to expend as he thought best, or to pay a weekly allowance. Thus in July 1789 it was resolved

That two shillings and sixpence per week be paid out of the society's funds into the hands of Mr Thos. Holland of Leeds until further orders, to be applied as he shall in his discretion think fit, towards the more

comfortable support of Mr John Moxen, an attorney now in the Workhouse at Leeds, either in apparel or other necessaries, without relief to the parish, to commence immediately.

The society also paid the cost of printing lists of members, and of providing them with off-prints of articles of professional interest from the periodicals. In 1797 it voted twenty guineas to Anthony Dawson of Sheffield for his expense in prosecuting one Leander Fawcett who had been admitted without serving a clerkship, and in 1817 f.50 was voted to Charles Anderton to help him promote a bill to regulate the practice of unqualified conveyancers—again the solicitude about conveyancing. Sometimes the society was called in to settle disputes between members. In 1797, and again in 1812, it petitioned the High Sheriff and justices to improve the facilities provided for attorneys in the courts at York. A library was started in 1819, and the magistrates were asked to provide a room for it, and in 1828 the subscription was adjusted to make it more attractive for country members. In 1805 it was suggested that the sums allowed to witnesses for their expenses when they were brought to York to give evidence in criminal cases were inadequate —the sum of five shillings being considered 'inadequate even for a common labourer'. The behaviour of barristers towards the profession was closely watched. In 1812 John Pemberton, a barrister of York, was censured for having offered to prepare some conveyancing deeds for £18, and declaring that 'he was quite sure no attorney will transact the business under twice as much'. This, the society declared to be 'contrary to the established rules of liberal practice...and a direct infringement of the business of an attornev'.

The activities of the Yorkshire Law Society were remarkably similar to those of the Society of Gentlemen Practisers, and the resolutions and correspondence quoted amply support the view that in the latter years of the eighteenth century and the early years of the nineteenth, attorneys and solicitors were actively concerned for the 'liberal' and 'respectable' character of their employment. Further support will be afforded by a survey—necessarily less detailed—of the early history of some other provincial law societies.

<sup>&</sup>lt;sup>1</sup> The Courts were built in 1771. In 1797 the Society complained that the domes at the top made it difficult to hear counsel and witnesses, and in 1812 that there was room for only half the attorneys who attended.

On 2 October 1809 fourteen 'Gentlemen attorneys' met at the Mosley Arms Inn in Manchester, and resolved that 'the attorneys practising in Manchester and Salford do form themselves into a society'. At a dinner held on 20 October, thirty-seven members enrolled, and the constitution was drawn up. There were to be two dinners a year, the cost of which, and other incidental expenses were to be covered by an annual subscription of two guineas. The surplus was to be banked or invested at interest, and 'to be applicable to...charitable purposes in favour of any decayed members of the profession of the law'. This, according to the author of this brief history, was 'little else than a social and benevolent club', and its records end in May 1815. Up to that time six grants had been made to decayed members, of sums ranging from ten to twenty guineas.2 The Manchester Law Library, evidently an off-shoot of this society, was founded in 1820, at a meeting of seventeen professional men, and was originally housed in two rooms lent by the secretary and treasurer, Robert Kershaw. Another branch of its activities was a Law Students' Society, presumably for the articled clerks of members, which held weekly meetings from 1800 to 1811.3

The Law Society at Plymouth began with the formation of a society for 'founding and maintaining a Law Library'. Members were to be barristers or attorneys of Plymouth, Plymouth Dock, and Stonehouse, who were proprietors of, or subscribers to, the Plymouth Public Library founded in 1810. Every member was to give £5 or its equivalent in books, and to pay an annual subscription of £1. Twelve members attended the first meeting held in October 1815. In addition to maintaining the library, the society held an annual dinner at a place appointed by the president.

But the society concerned itself with more strictly business matters as well. In July 1819 a special meeting was called to con-

<sup>1</sup> Information about the Manchester Law Society is derived from a brief history by Alfred Tarbolton, published by the society in 1924, which I was able to see through the kindness of the present secretary.

<sup>a</sup> The existing society began in 1838. Its purpose was declared to be 'to promote fair and liberal practice, to maintain the interests of the profession in relation to general measures affecting it or producing changes of law or practice, to promote the information of its members, to settle disputed points of practice and decide questions of usage, and to prevent abuses'.

<sup>3</sup> Minute Books survive for the periods 27 July 1809 to 29 July 1811, and 1 March 1833 to 26 February 1835.

<sup>4</sup> These details are derived from a lecture on the early history of the society delivered by Sir William Munday in 1923, a copy of which was sent to me by the present secretary. The society's records were destroyed in the late war.

sider the bill before parliament to enable graduates of the universities to be admitted to the roll of attorneys after only three years' service as articled clerks. The meeting decided that 'such a facility of admission into the profession will prove injurious to its members', and drew up a petition to be presented to the House of Commons stating its belief 'that few persons after a residence at college would be found disposed to submit to the confinement and labour inseparable from the office of an attorney, but which your petitioners are perfectly convinced must be patiently endured by such as would become efficient members of the profession'. This is interesting, for it might have been expected that the attorneys, anxious to improve the social status of the profession, would have welcomed into its ranks men drawn from the classes which could afford Oxford and Cambridge. Their motives in opposing this bill were probably mixed. No doubt they thought that men who had been at the universities would not treat the profession with that high seriousness of purpose which they themselves brought to it. They were right, too, in suspecting that the education given at Oxford and Cambridge was less suited to the professional man than that which could be obtained at one of the numerous academies which had been established during the eighteenth century, and which often catered specifically for the man destined for business and the professions.<sup>2</sup>

<sup>2</sup> It was noted in the first proposals for Warrington Academy that 'It is now become a general and just complaint that some public provision is wanted for the education of young gentlemen designed either for the learned professions or for business' (quoted H. M. McLachlan, Warrington Academy, Chetham Society, New Series, 107, p. 11). See also N. Hans, New Trends in Education in the Eighteenth Century (London, 1951).

¹ In 1818 Mrs Munby of York was advised against sending her son Joseph to the University at Cambridge or Edinburgh, if she intended him to follow in his father's steps as an attorney. John Pearson wrote to her on 6 October: '...it would not only defeat all that you had planned for his future introduction into business; but would most probably be ruinous to him. He would learn little or nothing from the professors unless he were accompanied by a private tutor, and it would be next to miraculous if he were not totally corrupted by the profligate company into which he would be introduced....There is a certain measure of attainments in polite learning, which will always be useful in any profession; but great proficiency in learning, accompanied with a fine taste for the classics, will be more injurious than useful to a man of business. They may tend to multiply the sources of his enjoyments, but there is a danger of creating a distaste for the ordinary routine of an office.' Pearson advised sending the young man to some 'respectable academy' where he would receive an education more fitted for one who was to enter the professions. (Munby MSS. in the possession of A. N. L. Munby, Esq., Librarian of King's College, Cambridge. I am most grateful to Mr Munby for letting me look at his family papers.)

And there was probably also some resentment that they had to share the profits of the profession with men who entered it on easier terms than they themselves had done. This concession was, however, granted to graduates in 1821.<sup>1</sup>

In 1823 a special general meeting was called to consider a proposal that an association should be set up for regulating matters of practice between members. It was decided that the facilities provided by the existing institution were adequate, and the proposal was dropped. Two years later, the society expelled a member who refused to cancel an agreement he had made with his articled clerk 'to credit the latter, as against the premium of £500 stipulated in the articles, with the profits of all business introduced by the clerk to his principal'. In 1835, the society asked Mr J. W. Freshfield, M.P., then chairman of the Incorporated Law Society's committee of management, to draft a petition on their behalf asking for the abolition of the certificate duty. This was unsuccessful, but certain sentences may be quoted from it as exemplifying the feelings of an eminently respectable member of the profession at that date, and to show how closely they echo those expressed by many men some forty years earlier. Declaring that the tax was patently unjust, he went on to say that 'to act unjustly towards members of the legal profession, especially our branch of it, is too popular to warrant an expectation that our application will be favourably received.... It is for the interests of society', he went on, 'that attorneys and solicitors, the confidential advisers of their neighbours, rich and poor, should be sustained in character and in pecuniary circumstances, but the more common course is to depress them to the utmost, so that in the opinion of very many persons, the profession and dishonour are identified.' In essence, these sentiments seem to be exactly those of the Society of Gentlemen Practisers, and the earliest of the provincial law societies.

Three more of the early law societies will be described. The Gloucestershire Law Association began in 1817.<sup>2</sup> There was to be an annual meeting, and each member attending was to pay a guinea; absent members were to pay two guineas to the general funds of the Association. A committee of nine was to meet 'on the Wednesday at each Quarter Sessions at five o'clock in the afternoon for the

<sup>&</sup>lt;sup>1</sup> 1 and 2 Geo. IV, c. 48.

<sup>&</sup>lt;sup>2</sup> These details are derived from a short history of the society by H. H. Scott (1917), which was lent to me by the present secretary.

purpose of ballotting for members'. There were twenty-eight members at the first annual meeting held at the King's Head, Gloucester. The meeting of June 1819 resolved that 'the objects of this society be the distressed members of it, and also such other distressed attorneys and solicitors who are deserving, resident in this county and city and their respective families'. Other resolutions were passed which were intended to improve the legal services. One was to submit a memorial to the judges asking them to enforce the attendance of special jurymen at assizes, and the secretary was instructed to communicate the terms of this to the other law societies 'in the hope that they will co-operate in the object thereof'. The undersheriff was requested to make special arrangements for attorneys and their clerks in the courts, and the society offered to pay doorkeepers to see that none but attorneys entered by the doors reserved for their use.

The constitution of the society was drafted in December 1819, when it was declared

That the principal objects of the society be to sustain the character of a liberal profession by pursuing and encouraging an honourable course of practice and by discountenancing and repressing whatever has a contrary intent or tendency; and by marking with a becoming regard to what is due to members of the profession at large any unmerited imputation against their character and conduct, and also to afford relief to distressed members of the society and such other distressed attorneys and solicitors who are deserving resident in the said county and city and their respective families.

General meetings were to be held twice a year, and the attendance of members was strongly insisted upon. There were fines for absence and for unbecoming behaviour at meetings, and members of the society who were found guilty of unfair professional practices were to be expelled, and notices of their expulsion were to be published in all the local newspapers.

The society's funds were invested in the five per cents, and from time to time charitable grants were made. In 1821 £20 a year was voted to the widow of a member, and was to be continued until her son reached the age of sixteen. In 1826 the society advanced £120 to pay the stamp duty on his becoming articled to an attorney. In the following year the society appointed an agent in London to scrutinise on its behalf all bills affecting the profession that should be presented to parliament. The society was concerned for the status of solicitors in bankruptcy proceedings, and complained that they

were often blamed for delays which were in fact caused by barristers.¹ In the same year—1831—it was decided to oppose a bill before parliament which proposed that a general registry of deeds should be set up. A petition was presented to both houses, and the secretary was authorised to go up to London as often as he thought necessary to consult with the deputations from other law societies anxious about this matter.² In 1833 proceedings were threatened against an unqualified person who had prepared a lease, but were dropped on his apologising to the society for his presumption. In the next year, in protest against the recent seizing and opening of parcels sent by the Mail Coach, members were advised to send their parcels for London by the Paul Pry coach, which also was claimed to provide a speedier service. Much publicity was given to this, but the legality of the proposed course was questioned, and the matter was dropped.

There were sixteen founder members of this society, all except one of whom practised in Gloucester itself. By 1835 some eightyfive more attorneys had joined, and by that date members were drawn from all over Gloucestershire and Wiltshire.

The Birmingham Law Society was founded in 1818.<sup>3</sup> There were nineteen founder members, and by 1830 there were some fifty members. The purpose of the society was declared to be the 'promoting and encouraging a correct and liberal course of practice in the profession; and of discountenancing and opposing all practices that may have a tendency to bring it into discredit or to lessen its respectability'. There was to be a general meeting every year, and a basic subscription of £1; the treasurer was to call on members for additional sums when necessary. Members had to be attorneys of at least two years' standing, resident within ten miles of the centre of the city.

The first meeting of the society was held on 3 January 1818, in the Royal Hotel. It was proposed that a Law Library should be set up in a convenient room in the centre of the city,<sup>4</sup> and the committee was instructed to communicate with those 'gentlemen in London concerned to prevent improper persons acting as con-

<sup>&</sup>lt;sup>1</sup> This presumably refers to 1 and 2 William IV, c. 56.

<sup>&</sup>lt;sup>2</sup> The setting up of a registry of deeds was delayed until 1925.

<sup>&</sup>lt;sup>8</sup> I am indebted to the secretary and the librarian for permission to examine the minutes of the society.

<sup>&</sup>lt;sup>4</sup> In 1819 a room was rented from the Birmingham Philosophical Society; it was given up in 1822 as an unnecessary expense.

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veyancers'. In August the committee presented its first report. Its members stated that they had watched the progress of the insolvent debtors' bill and the bankruptcy bill 'until they were thrown out of the House of Lords', and had communicated with the members for the county concerning several objectionable clauses in these bills. They had also been in touch with those who were drawing up the conveyancers' bill, and had presented petitions in support of it, and they assured the society that although the bill had had to be withdrawn in the current session, they felt certain that it would pass in the next. They had also corresponded with the London Law Society, and had arranged that they should be sent the names of all those seeking admission at the beginning of each term so that they could inquire into the character of such of them as had served their clerkships in the neighbourhood of Birmingham. The Law Chronicle and Smith's Lists were to be taken for the benefit of members. Representations had been made to the chairman of the Warwick Quarter Sessions about the inconvenient arrangements of the Nisi Prius Court.<sup>1</sup> It was laid down as a rule of practice to be followed by members that 'except where attorneys are agreed upon by parties, leases shall be prepared by the leasor's attorney unless the lease is in the nature of a sale'.

The society's minutes show that it continued to maintain this energetic concern for professional interests. In 1820 it was resolved to ask all the Inns of Court to supply the society with the names of any persons from the Birmingham area who applied to be admitted as conveyancers—the perennial subject—so that inquiries could be made as to their 'fitness and respectability'. In 1824 an attorney was struck off the Roll at the society's instigation, and the committee was instructed to watch the progress of any bills which might be introduced for the recovery of small debts, in order to prevent the public from being deprived of its right to appear by attorney.

By 1828 the committee's reports show it acting as a fully developed and responsible professional body. It pointed out that it was due to the Birmingham Law Society that the practice of Gray's Inn in admitting unqualified persons who afterwards took out certificates as qualified conveyancers had been stopped, and added: '...if anything were wanting to evince the usefulness of an association of the respectable members of the profession, it is fully estab-

<sup>&</sup>lt;sup>1</sup> It was reported, in February 1820, that the court had been altered so as to be more convenient for attorneys.

lished by the benefit that must result to the public at large and to the profession by the measure above mentioned'. The committee expressed its concern at the 'alarming increase in the number of the profession—the applications for admission in Michaelmas Term next are no less than 204, being at the rate of 816 a year'. They felt that this increase could be more effectively curbed by limiting the number of clerks articled to an attorney at any one time to one, than by increasing the stamp duty on articles of clerkship, and impressed upon the society the great importance of this subject for the whole profession.

In October the society, like that in Gloucestershire and Wiltshire, considered the proposal to set up a general registry of deeds. The Birmingham Law Library Society, which was founded in February 1831, amalgamated with the Law Society after only eighteen months of independent existence.

The Kent Law Society was founded with twenty-nine members in 1818, 'to promote fair and liberal practice and prevent abuses in the profession'.¹ Members were to dine together at Maidstone on the day following Commission Day at the Assizes. The early meetings were held at the Rose Inn, Sittingbourne, and were concerned with revising charges for conveyancing. The society heard complaints against members, contributed £10 towards a fund raised in 1822 to assist the widow and eleven children of an attorney of Stratford on Avon who had been accidentally killed, and in 1831 this society also drew up a protest against the proposed bill for establishing a general registry of deeds and instruments affecting real property.

Some remarks may be added about the Sunderland Law Society, which the present society believes to have been founded in 1824.<sup>2</sup> Its principal objects were to 'preserve the privileges and support the credit of attorneys and solicitors, to promote fair and liberal practice, and to adopt such measures as may appear best calculated to effect these ends and most likely to secure respect to the profession and to be of advantage to the employers'. The rules of the

<sup>&</sup>lt;sup>1</sup> This information is derived from a pamphlet published for the society in 1948, sent to me by the secretary.

<sup>&</sup>lt;sup>1</sup> This information is derived from a copy of the rules of the society sent to me by the secretary.

society were familiar to those of the other societies already described—there is almost a common form of declaring the initial purpose of the societies by this time—but there are two additional rules. It was decided that 'in order to protect and preserve the respectability of the profession no member shall take an articled clerk without receiving with him a fee of One hundred pounds nor shall he give any salary or allowance of any description whatever to a clerk during the time he is under articles nor contract to give him any after the expiration thereof in consideration of his service'. It was further laid down that members who had to appoint commissioners in bankruptcy cases, or any other commissions issued out of chancery, should appoint members of the society only. At a special general meeting held in the same year a scale of charges to be made by members was adopted.

All these societies exhibit very clearly in their constitutions and in their activities those aims which the would-be reformers of the profession were beginning to insist on in the last decades of the eighteenth century. The very language they use is remarkable in its similarity: 'liberal', 'respectable'—these are the key words of these minute books as they are of the pamphlets of the period. The societies are among the first effective and responsible professional bodies to be founded, and they set an example which was quickly followed by attorneys all over the country, and provided a pattern along which other professional societies were to develop in the future. Of course they were neither so numerous nor so efficient as they were later to become: they had no need to be. And while it may truly be said of them, as Sir John Clapham said of the early Chambers of Commerce, established in these same decades by similar sorts of men, that 'although characteristic British organisations, [they] played only a subordinate part in the life of the country',1 the part they played in the profession then, and as exemplars for the future, was not without importance.

<sup>&</sup>lt;sup>1</sup> Economic History of Modern Britain, 2nd ed. (Cambridge, 1950), 1, 310. See also the article by J. M. Norris on 'Samuel Garbett and the Early Development of Industrial Lobbying in Great Britain', in Economic History Review, 2nd series, x, 3 (1958), pp. 450-60.

### CHAPTER V

## THE MAKING OF AN ATTORNEY

In the education of the attorney the Inns of Chancery played little, and eventually no part. They never performed for the profession those services which the Inns of Court rendered the barristers. In spite of the repeated injunctions of the judges that all attorneys should belong to one or other of these Inns, they continued to decline throughout the seventeenth century, and by the eighteenth century they were of negligible importance in the history of attorneys and solicitors. Those services which they could have performed by giving institutional representation and control to the profession were taken over by bodies specially created for this purpose which have just been described.

There were two general reasons for this decline. In the first place, the profession became too large for the Inns to hold all its members, who were in any case too widely scattered in the provinces for membership of an Inn to be anything more than nominal. This was probably true of an increasingly large proportion of the profession, as the country attorney became an established figure in provincial life, relying on an agent in London to perform those functions for his clients which demanded personal attendance at the courts or law offices in town. In the second place, the Inns of Chancery declined because the sort of education they could provide -occasional readings by some barrister from the Inns of Court which patronised them<sup>2</sup>—was totally inadequate as a training for the sort of work which the attorney was called upon to do. His employment was eminently practical in character, concerned with the forms of legal processes and the application of the laws to a wide variety of situations: he was judged by his acquaintance with the techniques of the law, rather than by his knowledge of its more theoretical aspects.

This being so, the obvious way in which to educate the attorney, the apprenticeship system, was the one adopted. No amount of

<sup>&</sup>lt;sup>1</sup> See above, pp. 7-8; the history of the Inns of Chancery is noticed by Holdsworth, *History of English Law*, II, IV, VI, and XII.

<sup>&</sup>lt;sup>2</sup> Cf. Holdsworth, op. cit. XII, 41.

knowledge of the principles of the law could take the place of that dexterity in its practice which could only be obtained by working alongside an attorney already in business.

This was accepted by most men for perhaps the greater part of the eighteenth century.¹ It was an age realistic in its values, and the class from which in general attorneys were drawn was perhaps notable in its reluctance to indulge in the more useless frills of education. By the end of the century, those who were concerned to increase the respectability of the profession (when respectability had become profitable)² were beginning to suggest that this might be done by giving the attorney a more 'liberal' education. But in the meantime, it was the practice of the law, and not its principles, that was held to be the proper concern of the attorney, and for this the apprenticeship system was better suited than any sort of legal university in London.

And the apprenticeship system, found suitable and generally adopted, was that which was insisted on by the act for regulating the profession which was passed in 1729. No one was to practise as an attorney unless he was properly admitted to the Roll, and he would not be admitted unless he had been 'bound by contract in writing to serve as a clerk for and during the space of five years, to an attorney duly and legally sworn and admitted'. Before he was admitted, the judges were 'authorised and required...to examine and inquire, by such means as they shall think proper, touching his fitness and capacity to act as an attorney'.<sup>3</sup>

And later. In 1821 Jonathan Dixon wrote to Joseph Munby who was articled to an attorney, and who had expressed dissatisfaction with this mode of education: 'Your making out warrants and copying abstracts is at least as profitable a mode of employing time as my paging the statutes at large, and the only remedy is to acquire as much theoretical knowledge as you possibly can which you will find of the most essential service when a little practice is superadded. Blackstone should be read again and again nam decies repetita docebit for the infinite variety of matter and compressive style in which the Commentaries are composed render it impossible to retain the many principles and doctrines they embrace unless imprinted on your memory by reiterated perusals. An admirable adjuvant in this respect may be found in Field's analysis of Blackstone in a series of questions to which the student is to frame his own answers.... What has been called copying the trash of an attorney's office is applicable only to the students intended for higher departments of the law, an attorney's office contains nothing that a cadet attorney should consider trash' (26 January 1821. Munby MSS.).

<sup>&</sup>lt;sup>2</sup> Cf. Dr Johnson. 'What is their reputation but an instrument of getting money?' (Boswell, *Life*, Everyman ed. II, 405).

<sup>&</sup>lt;sup>8</sup> 2 Geo. II, c. 23, sects. v and vi; sect. xv prohibited an attorney from having more than two articled clerks at any one time. The act of 1605 had required that

Some of these stipulations, notably that concerning the examination by the judges, were difficult to impose, and were probably carried out in a perfunctory manner. 1 And without this examination, the obvious fault inherent in the apprenticeship system—that it was too personal in character, varying from master to master was allowed full scope for development. The attorneys were drawn from a wide variety of social positions, and their practices varied enormously from that of the great London attorney, to that of the small attorney in a country town. In consequence there was little hope that all attorneys' clerks would acquire even a certain minimum of legal education.

An effective examination system would have guaranteed this, but in general all that the judges seem to have required of the clerk seeking admission was an affidavit from his master—or his master's London agent—stating that he had served the prescribed period in articled service. Some attorneys were probably not as scrupulous as they ought to have been in training their clerks and ensuring that they had an adequate knowledge of their profession before signing these affidavits. The critics of the profession often accused them of caring more for the premiums which the clerks brought with them than for the task of teaching them their craft. Indeed, it was more than once suggested that too many attorneys were prepared to forgo a premium altogether in the case of a clerk who would serve them as a footboy or boot-black in return for a promise of his articles at the end of five years.

During the eighteenth century, the attorneys' clerks hovered between the position of being apprentices to a trade like any other, living in their masters' houses and running errands for their wives,2 and that of the articled clerk, paying his master a handsome premium, no longer living in his household, demanding and receiving a more serious education in his profession. This development is to some extent a chronological one: the type of the modern articled

none should be admitted save those 'brought up in the courts or otherwise well practised in soliciting of causes, and have been found by their dealings to be

skilful and of honest disposition' (3 Jac. I, c. 7).

Cf. the admission of William Hickey, Appendix II below.

This is said to have been the lot of Philip Yorke, articled to his father's town agent, Mr Salkeld, 'whose wife, a thrifty woman, frequently annoyed him with household errands. To these, at length, he put a stop, by charging her one shilling and sixpence for a cauliflower, which she had begged him to buy, "as he was going past the greengrocer's":—sixpence for the cauliflower, and a shilling for a sedan chair to bring it home in' (The Georgian Era (London, 1833), II, 278).

clerk is a common figure by the end of the century; but exceptions remained. It is, however, a development which is at one with other changes in the profession, and one which is suggested by an examination of the conditions of clerkship during the century.

The Stamp Office registers, giving details of the premiums paid by all apprentices after 1710, provide general information about the attorneys' clerks which is not available elsewhere. They are probably not complete, but they are perhaps full enough to give a correct impression of the sort of premiums which were paid, the length of articled service, and the social background of the clerks. They will be examined in detail at three points during the century.

In the volume recording stamp duties paid to the London office for the period October 1711 to November 1712,2 some forty-six apprenticeships to attorneys are noted. Of these, thirty-nine apprentices were to serve for five years, three for four years, two for seven years, and one each for the periods of three and six years. The premiums paid vary from £20 paid for the son of an Ipswich clergyman to an attorney living in the Inner Temple, to £250 paid by a gentleman of Bath and £268. 15s. paid by an 'esquire' of the Middle Temple to article their sons to one of the Clerks in Chancery. Only eight premiums were less than f. 100. Most of the masters mentioned practised in London, many of them having addresses in the Inns of Court and Chancery. The clerks themselves came from all over the country, from London, Surrey, Essex, Kent, Norfolk, Suffolk, Wiltshire, Northumberland, Carmarthen, Berkshire, Hampshire, Rutland, and Cornwall. In thirty-four cases some indication is given of the parents' social standing. Eleven are classified as 'Gents', eight as 'esquires', six as clergymen<sup>8</sup> (including two Doctors of Divinity, one of them the Archdeacon of Lincoln), a victualler, a gun-stock maker, an apothecary, a saddler, a mercer, a drugster, and a watchmaker.

The earliest volume recording duties paid to the country collectors covers the period January 1711 to June 1713.4 Here some nineteen entries relate to attorneys' clerks. Eleven clerks are

<sup>&</sup>lt;sup>1</sup> 8 Ann. c. 9. <sup>2</sup> P[ublic] R[ecord] O[ffice], I.R. 1/1.

<sup>&</sup>lt;sup>8</sup> In his unpublished dissertation (p. 483) Mr Bezodis calculates that out of 610 children of clergymen apprenticed between 1710 and 1720, sixty-one were to lawyers, seventy-two to apothecaries, twenty-seven to barber surgeons, thirteen to surgeons, three to druggists, thirty-three to merchants, mercers, and merchant-tailors.

<sup>4</sup> P.R.O. I.R. 1/42.

articled for five years, five for four, one for seven, one for six, and one for three years. The lowest premium paid was £34, the highest £110; only two were sums below £50. In most cases the entries show the country attorneys taking clerks from the same town or county. The status of parents is not always given, but there are four 'Gents', two clergymen, an 'esquire', a yeoman, a clothier, and several widows among them.

The city register for the period May 1752 to July 17541 mentions 241 attorneys' clerks. Again the vast majority are bound for a period of five years; ten are for seven years, six for six years. One clerk is articled for nine years, paying a premium of £10, another is said to be bound for one year only to an attorney of Staple Inn, paying a premium of ten guineas. This last entry, and others mentioning such periods as four months three days (premium £3. 15s.), and two years eight months, may relate to clerks who had been turned over from one master to another; this however is not certain, since there are several instances where this is specifically stated to have happened. Premiums in this register vary considerably from sums of 5s. paid when a clerk is articled to his father, and sums like £20 and £30, to sums such as £260, £300, £315, £350, and £400 (paid to a Middlesex attorney, Robert Jones). There are eighty-two premiums of £50 and under, fifty-nine up to £100, seventy-one up to £200, twenty-three between £200 and £300, and six above £300. Masters and clerks mentioned come from all parts of the country. In all except two cases where the premium is £200 and above, the master is an attorney of London or Middlesex: the exceptions are attorneys in Chelmsford and Stafford. No indication is given in this volume of the status of parents, but it includes references to Roger, the youngest of four sons of Lloyd Kenyon, and brother of the judge, who was articled for five years to James Tomkinson for a premium of £210;2 and to George Delaval, articled to Arthur Pond in the parish of St Giles in the Fields for five years, giving a premium of £300.

In the country register for October 1750 to August 1754<sup>8</sup> some 108 clerkships to attorneys are noted. Five years is by far the most common period served, though again there are occasional instances

<sup>&</sup>lt;sup>1</sup> P.R.O. I.R. 1/19.

<sup>&</sup>lt;sup>1</sup> Lloyd Kenyon, the second son, had also been articled to Tomkinson. Roger is said to have 'attained considerable eminence' as a London solicitor (G. T. Kenyon, *Life of Kenyon* (London, 1873), pp. 17-19).

<sup>&</sup>lt;sup>8</sup> P.R.O. I.R. 1/51.

of clerks who were bound for periods of three, six, seven, and even one of eight years. There are thirty-eight premiums of sums up to £50; forty of sums up to £100; twenty-seven up to £200; and three above £200. The highest sum mentioned in this register is £300 paid to a Clerk in Chancery for a clerkship of five years; and there are again such small sums as £2. 15s., £3, £5, and 10 guineas. There is no indication in this register of the social status of parents.

The last two registers to be examined are those for the years round the turn of the century. The city registers for the period March 1799 to June 1802,1 mention some 380 clerkships to attorneys. In only fourteen cases is the period served other than five years. Some amounts paid as premiums are only nominal sums, but there is still a fair number of smaller sums which do not appear to fall into this category. The highest sum paid is £525. Sixty-five premiums are amounts of £50 and below; there are fifty-one between £50 and £100, 106 between £100 and £200, eighty-nine between £200 and £300, forty-four between £300 and £400, eighteen between \$\( \frac{1}{4}\) and \$\( \frac{1}{5}\) oo. There are also nine premiums of £525, all of them paid to London attorneys. No information is given about the social background from which these clerks are drawn. Of the premiums between £400 and £500, nine are paid to London attorneys, but the rest are to attorneys in such places as Bath, Bristol, Cheltenham, and Newport, but also at St Austell, Chard, Ashburton, Bewdley, Bridgwater, and Wellingborough.

The country register for the period August 1799 to May 1803<sup>2</sup> refers to sixty-six attorneys' clerks. Nine premiums are of £50 and under; there are four between £50 and £100, twenty-five between £100 and £200, eighteen between £200 and £300, seven between £300 and £400, and there are three sums above £500. Of these last, two are sums of £525 paid to attorneys in Cirencester and Southampton, and the third is one of £551. 5s. paid to a Reading attorney.<sup>3</sup>

These records suggest that many men of humble birth and modest means could become attorneys. For them, a clerkship to an attorney provided the means of surmounting the first—and often the

<sup>&</sup>lt;sup>1</sup> P.R.O. I.R. 1/38. <sup>2</sup> P.R.O. I.R. 1/70.

<sup>&</sup>lt;sup>8</sup> The country registers also include references to the Writers to the Signet in Scotland; in all cases the premium is £100, and the term five years. Parts of these registers relating to certain counties have been published. See Surtey Record Society, x (1929); Sussex Records Society, xxvIII (1924); and Bedfordshire Records Society, IX (1925).

most difficult—obstacle in the way of social progress. The professions, in which individual merit may count for more than inherited status, have always been one of the bridges across the gulfs which tend to separate society into classes. For many in the eighteenth century the profession of attorney was an accessible social bridge. It helped a good many men to find a place in society more commensurate with their abilities than that to which they had been born, and one which otherwise would have remained beyond their reach.

There were, of course, those who attacked the profession for just this reason. It did violence to their notions of the perfect and static and hierarchical ordering of society, and raised to an unwarranted eminence many whose birth in no way justified them for it. Complaints of this sort were not always unreasonable. Many attorneys were undoubtedly not over-scrupulous about the sort of men they took in as clerks, nor over-assiduous in teaching them their craft. But not all of those who could afford no premium, and received their articles in return for the performance of menial tasks for their masters were without merit: no more than were the sizars and servitors at the universities.

William Skelton began life as a foot-boy to Bishop Compton of London, and might have risen no further had he not been articled to an attorney as a reward for detecting a plot by the cook at Fulham Palace to poison his master.¹ Skelton is said to have prospered, and so did many others for whom a clerkship provided the opportunities afforded by a scholarship in a more equitable society. Sir John Hawkins, the youngest son of a carpenter, became a prosperous attorney. Bishop Warburton was articled to an attorney, and may have practised for a short time in Newark,² and among the judges, Hardwick, Kenyon, Garrow, Somers, Macclesfield, Strange, and Jocelyn all received their early training in an attorney's office.

It is true that some of them went to an attorney's office only to get acquainted with the law in its more practical aspects, and as a preliminary to being called to the bar—the office of Charles Salkeld in Great Brook Street was almost a preparatory school for judges<sup>3</sup>—but there were some like Kenyon and Philip Yorke who were

<sup>&</sup>lt;sup>1</sup> Dorothy Stroud, Capability Brown (London, 1950), p. 44, note.

<sup>2</sup> DNR

<sup>&</sup>lt;sup>3</sup> Robert Jocelyn, Lord Chancellor of Ireland, Macclesfield, Hardwick, and John Strange, Master of the Rolls, all spent some time in his care. Blackstone deplored the practice whereby barristers abandoned a liberal education for the

regularly articled to attorneys, and in the beginning intended to be attorneys themselves.

But the bootblacks on the one hand, and the judges on the other, are the exceptions. In between these extremes there was a broad group of men who never aspired higher than the middling prosperity of the comfortable country attorney. This in itself was something of an attainment for many men, but one of the trends which may be noticed throughout the century is the development of a class-consciousness among attorneys of this sort, which eventually led them to try to exclude social climbers from the lower orders by insisting on higher premiums and higher standards, and social as well as professional qualifications. Or rather, they made a social virtue, respectability, into a professional one.

A further indication of this trend is given by a change in the status of the clerks themselves. At the beginning they were apprentices like any other, commonly living with their master, learning their trade in the intervals of performing more menial tasks for their master's wife. But the position was changing, and in 1760 an attorney could look back on the old days with regret. 'Tempora mutantur', he sighed, 'why, formerly our apprentices would scrape our entries and sweep our shops; why, they will not do that now.' It was complained that attorneys' clerks were

under no manner of government; before their times are out, they set up for gentlemen, they dress, they drink, they game, they frequent the more mechanical training of an attorney's office. Cf. Commentaries, Book I, 1768 (Inaugural Lecture as Vinerian Professor, 1758), pp. 31-2. See also Joseph Day, An Address to the Attorneys at Law, etc. (1796), p. 14, where he speaks of the habit of placing young men in an attorney's office 'rather as a check on habits of dissipation than with the intent or expectation that sufficient application would be given to attain a useful degree of professional knowledge'. A somewhat similar position to Salkeld's was occupied by Charles Sanderson, attorney of the Inner Temple. See E. Hughes, North Country Life in the Eighteenth Century (Oxford, 1952), p. 77.

1 Records of the Society of Gentlemen Practisers, p. 257. The Society was aware of this development, and decided in 1748 that 'clauses should be offered for the consideration of parliament for the more effectually obliging the clerks of attorneys and solicitors to an actual and menial service of their masters, until such time as each of them were regularly assigned over to another attorney or solicitor' (ibid. p. 29). Defoe complained of this development as early as 1715. In his Family Instructor, in a dialogue between the father and the master of an apprentice, the father complains that his son has not received proper supervision. To this the master replies: 'Apprentices are not like what they were when you and I were apprentices. Now we get a hundred, or two or three hundred pounds apiece with them; they are too high for reproof or correction' (quoted O. J. Dunlop, English Apprenticeship and Child Labour (London, 1912, p. 211).

playhouses, and intrigue with the women; and it is a common thing with clerks to bully their masters and desert their service for whole days and nights whenever they see fit. And indeed, people consider little else at this day in the choice of clerks or apprentices than the sums they are to have with them; one, two, or three hundred pounds are given with a clerk or apprentice, who is looked upon as a boarder rather than as a servant: He takes little care of his master's business, and the master as little to instruct him in the mystery of his profession.

While this may be evidence that the social position of the attorneys was improving, there were some who thought these developments detrimental to the education of the profession. In 1815 William Wright wrote:

Parents who wish to place their sons in the office of an attorney have to lament that very few will now take them into their families. And young men who are articled to an attorney without any guardian over their conduct farther than relates to the duties of an office, and ushered into life without those restraints which are necessary to their happiness, are placed in a situation where they will meet with temptations to vice which many of them will be seduced by, and thus contract habits of dissipation extremely detrimental to their characters and improvement.<sup>3</sup>

# And, he went on,

The advantages which a young man receives from proper superintendence are sufficient to turn the scale much in favour of placing him in a respectable attorney's family, in preference to lodgings, where he will be at liberty to act as he pleases, and where he will consider himself conferring an obligation rather than receiving one.<sup>4</sup>

- <sup>1</sup> Cf. Tom Jones, Book v, ch. 6: 'Will Barnes was a country gallant, and had acquired as many trophies of this kind as any ensign or attorney's clerk in the kingdom.'
- <sup>8</sup> Stow's Survey of London, ed. John Strype (1755), II, 559, partly quoted in Dunlop, op. cit. p. 232. A correspondent to Felix Farley's Bristol Journal in 1784 remembered a time when apprentices and attorney's clerks dressed in plain clothes, 'But now, gold laced waistcoats, ruffled shirts, and silk stockings are becoming the ordinary wear of every shopboy in the city' (quoted in John Latimer, The Annals of Bristol in the Eighteenth Century (Bristol, 1893), p. 461). In 1794 apothecaries complained that 'while an attorney can easily procure a premium of 3, 4, or 500 pounds...an apothecary, whose profession is of infinitely more consequence, is generally obliged to accept a much smaller sum' (J. M. Good, History of Medicine (London, 1795), p. 154; quoted by Dr B. M. Hamilton in her unpublished London thesis).
- William Wright, Advice on the Study and Practice of the Law, pp. 165-6.
  Ibid. p. 167. For an attorney who satisfied Wright's standards, see pp. 184-5 below.

The apprenticeship system permitted the widest variety of standards among attorneys and their clerks. Some masters took their task seriously. The apprenticeship of Richard Carre to Francis Sitwell and Thomas Wright, for example, seems to have been closely watched. 1 Carre was given a wide experience in all aspects of his master's business. He spent a great deal of time copying precedents, engrossing deeds, and the like, and was encouraged to study the law books when no other business was on hand. He was probably treated more kindly, and educated more effectively, than Thomas Chatterton, who was articled to a Bristol attorney in 1767. He was kept in the office from eight in the morning to eight at night, given his meals in the kitchen, and made to share a bed with the foot-boy. To the annovance of his master he spent more time in scribbling verses than in learning the law, and when he eventually ran away to London, Chatterton was 'so ignorant in his profession that he was unable to draw out a clearance from his apprenticeship' that his master had demanded.2

Very different from either of these was the apprenticeship of William Hickey. Hickey's father was a prosperous attorney, moving in elegant society in London.<sup>8</sup> Somewhat reluctantly, because he already had two partners, his elder son and Nathaniel Bayley, he had articled William to Bayley in 1765. The practice was a large one, but Hickey was given too much money, too little to do, and proceeded to lead the life of an extravagant and fashionable man about town.4 For eight months all went well, and Hickey pleased both Bayley and his father, and became popular with many distinguished lawyers. Only Thurlow expressed his doubts about his suitability for 'The dull and irksome drudgery of that laborious profession'. And Thurlow was right. In 1767 Hickey misemployed

<sup>1</sup> See Appendix I below.

<sup>2</sup> Chatterton to his mother, 17 May 1770; quoted G. Gregory, Life of Chatterton (London, 1789), p. 80.

<sup>3</sup> He figures in Goldsmith's Retaliation, along with Garrick, Cumberland, Reynolds and others—company which Sir George Trevelyan considered 'Far too good for him' (Early History of Charles James Fox (3rd ed. 1881), p. 143, n. 1).

<sup>4</sup> Cf. Fielding, Covent Garden Journal, p. 37, where he says that the word 'fashion' cannot be derived from the French 'façon', 'which is often used to signify affectation. This will extend too far, and will comprehend attornies' clerks, milliners, mantua makers, and an infinite number of the lower

<sup>5</sup> Cf. Cobbett's opinion of the attorney's employment: 'Gracious Heaven! if I am doomed to be wretched, bury me beneath Iceland snows, and let me feed on blubber, stretch me under the burning line, and deny me the propitious some money entrusted to his care, was discovered, and expelled from his father's house.

The examination which the judges were required to make of the qualifications of clerks before admitting them to the Roll was not conducted in a manner which would have imposed a measure of uniformity on the standards of education among attorney's clerks. Hickey's own examination, when he came eventually to seek admission, may have been exceptional, and his account may be as exaggerated as it is colourful, but it is only an exaggeration. The judges had not the time—some thought they had neither the ability nor the inclination—to conduct a satisfactory examination of all clerks who presented themselves for admission to their courts. And there were, indeed, those who thought that a clerk who had served the required length of time had a right to be admitted without having to submit to the impertinence of an examination.<sup>2</sup>

So it was left to private individuals and to the professional societies to impose what order they could on the education of attorneys by scrutinising the lists of those seeking admission, making suggestions for fresh regulations and an improved system, even occasionally by taking very great pains over the training of those clerks entrusted to them.

One London attorney, Thomas Hood, sent his son who was destined for the profession to school at Sheffield, thinking that Harrow was too near his home and the softening influences of his mother. A local attorney, John Hoyland, kept a fatherly eye on the boy, and the letters exchanged between the two men, mingled with correspondence on professional matters,<sup>3</sup> show how seriously the boy's education was taken, and how concerned his father was that he should never be allowed to forget that he was intended for the law. 'We must not fill his head nor yet his heels with too much music', he wrote, 'it may unfit him for Coke upon Littleton which is of more importance...he must be taught to understand that he

dews,—nay, if it be thy will, suffocate me with the infected and pestilential air of a democrat's club-room; but save me, whatever you do, save me from the desk of an attorney' (quoted Croake James, *Curiosities of Law and Lawyers* (London, 1882), p. 13).

<sup>&</sup>lt;sup>1</sup> See Appendix II below.

<sup>&</sup>lt;sup>2</sup> Cf. the attack made on these people by Joseph Day in his Thoughts upon the Necessity and Utility of Examinations, etc. (1795), p. 5.

<sup>&</sup>lt;sup>3</sup> Hood was Hoyland's London Agent.

is not intended for a fine gentleman but for industry. Boys get notions in their heads sometimes which lead, or rather mislead, them to strange consequences.'1

Hood's words were prophetic, for when Dick was home at Easter he let fall some opinion about not liking the law, and annoyed his father considerably. 'What he can mean by liking or disliking anything', he wrote to Hoyland, in a letter asking that his son's education and behaviour should be more closely watched in future,

much more daring to speak out, is no small surprise to me. I shall expect him to like what I may think to prescribe to him when the proper time arrives....I don't take notice to him how much he has disobliged me, but for the future shall watch his motions jealously and desire the like from all under whose care and eye he may happen to be placed. For his education to me will be almost indifferent upon any other plan than the profession of the law. If he should ever defeat my good intentions to him in this pursuit he will forfeit for ever my friendship and affections to him as a parent.<sup>2</sup>

In the event, the behaviour of his clerks forced Hood to take Dick into the office earlier than he had intended. 'I must get him a private master to teach him here', he wrote to Hoyland, 'he will never do any good if he is not a Latin scholar.'<sup>3</sup>

Hood's opinions about the education of attorneys were shared by others. In 1767 Jonathan Dawson of Thorne wrote to Samuel Dawson of Sheffield about a clerk the latter had recommended:

Since I had the pleasure of seeing you at Pontefract I have agreed with a writer, notwithstanding which I would also take a clerk and should pay as great a regard to your's as to any man's recommendation, but I really think seventeen years (at this gay time) is rather too old to go out to business, young men then begin to think, and judge for themselves, rather than follow the directions of a master, which to them appear irksome. And this I have so much experienced by the irregularity and misbehaviour of my late clerk who had a good capacity and was a good scholar, but he had been too much indulged by fond parents, that nothing would induce me to take another whom I had the least apprehension of turning out amiss. The fee I expect is 100 guineas in case the young man and I should like each other; but could I meet with a

<sup>&</sup>lt;sup>1</sup> Sheffield City Libraries, T[ibbitt's] C[ollection], 542/1, 20 January 1775.

<sup>&</sup>lt;sup>a</sup> T.C. 524/35, 18 April 1775.

<sup>&</sup>lt;sup>3</sup> T.C. 524/39, 4 May 1775.

well-disposed youth who had gone through a clerkship and knew business, I would much sooner make him a handsome allowance than take a clerk, for with my last I took as much pains as if I had been his father, and gave him all the information and instruction in my power, and where a master acts upon that principle, the fee given with the clerk is not much to be considered.<sup>1</sup>

Both Hood and Dawson thought that the clerk's education should be practical in character, strictly subordinated to the demands of his future employment. Others, however, thought that the standards of professional education, as well as the standing of the profession in society, would be improved if it was less 'mechanical' and more 'liberal'. William Wright thought that 'The profession will become more respectable as it becomes more learned',² and regretted that clerks were not allowed more time for general study. The accomplished attorney, he believed, should not confine himself to the more practical aspects of the law, but should also be acquainted with history, the law of nature and of nations, the old law books, the classics, and one of the systems of shorthand.³

Other writers were also concerning themselves with this problem.<sup>4</sup> Charles Ilsley agreed with Wright that the attorney should receive a 'liberal education',<sup>5</sup> because of the wide range of problems with which he had to deal, canals, turnpikes, enclosures, and the like.<sup>6</sup> Ilsley's opponent on the question of taxing the profession also differed from him on the matter of education.<sup>7</sup> He pointed out that

this word 'liberal' has not a very definite signification, what one man would consider a liberal education would, in the estimation of another of a more liberal turn of mind, be but a confined one. If the word liberal

<sup>1</sup> T.C. 522/257, 22 September 1767.

- <sup>3</sup> William Wright, Advice on the Study and Practice of the Law; he also thought that those who sought 'honourable distinction' should associate only with those 'distinguished for good sense, good morals, urbanity of manners, and an ardent desire for the attainment of knowledge'.
- <sup>3</sup> *Ibid.* pp. 165-6. Wright also had some remarks on the necessity of taking exercise, but discouraged field sports as 'apt to fascinate too much'.
- <sup>4</sup> For example, a pamphlet of 1794 which I have not been able to find: Remarks on the Education of Attorneys, designed to promote a reform in the inferior order of the profession of the law.
- <sup>5</sup> A writer in 1747 thought that attorneys' education should be 'liberal', in order to give them a bias above 'little pettifogging practices' (R. Campbell, *The London Tradesman*, etc.).
- <sup>6</sup> Charles Ilsley, A Brief Inquiry concerning the origin, progress and impolicy of taxing attorneys, etc. (1804).
  - <sup>7</sup> In A Defence of Attornies, etc. (1804).

be taken in a liberal sense, then we must suppose that the writer thinks it necessary for an attorney to imbibe his knowledge from the bountiful bosom of Alma Mater, 1 and then to take the Grand Tour, by way of qualifying himself for the mighty undertaking of minuting down a few resolutions respecting the cutting of a canal. But perhaps we are to understand that the writer means a common classical education merely. Still, to prove the necessity of such an education, an attorney's liability to be called upon to take the minutes of a public meeting is but a sorry argument, for, surely, nothing further is requisite for that purpose than to have a clear head, and to be able to write grammatically in the vulgar tongue.<sup>2</sup>

Ilsley had suggested that an attorney needed more than a 'smattering in the vulgar tongue', and further, that attorneys should be 'clothed at least with some portion of that venerable dignity and antiquity which Sir Edward Coke has informed us is to be found in our old law books, laws and records'. This the author of the *Defence* took to mean Glanvill, Bracton, Britton and Fleta, Hengham, the Year Books, Statham, Brooke, Fitzherbert, Staundforde, and many others who wrote before Coke, and asks:

When it is considered that he [the attorney] must spend the five years of his clerkship copying at the desk, or in some other mechanical part of the business, as running to the different offices, attending the different courts, etc., what leisure can he reasonably be expected to have had, for going through a course of study so difficult and laborious? Ten years are not sufficient to enable any man, however bright his talents, to accomplish such a task, even although he should devote to it the whole of his time and attention...the absurdity of the thing is palpable and glaring.

He concluded: 'If an attorney be well acquainted with Coke upon Littleton, Blackstone's Commentaries, and the best modern treatises upon practice, together with the determinations upon modern cases, we may pronounce him an able attorney.' Such researches as Ilsley had suggested might legitimately be required of a barrister, but for an attorney they were superfluous.<sup>3</sup>

<sup>&</sup>lt;sup>1</sup> By 1821 graduates wanting to enter the profession were sufficiently numerous to obtain a concession in their favour by which they had to serve only three years in articles. 1 and 2 Geo. IV, c. 48. See above, pp. 45-6.

<sup>&</sup>lt;sup>2</sup> A Defence, etc. pp. 41-2. Joseph Simpson, in Reflections on the endowments required for the study of the law, 3rd ed. (1764), recommended a period at the university after clerkship.

<sup>&</sup>lt;sup>3</sup> A Defence, pp. 34-5.

In 1846 a Select Committee of the House of Commons investigated the state of legal education. As far as attorneys and solicitors were concerned, it was generally agreed that

For the mechanical and almost manual dexterity, which though inferior, is still indispensable, sufficient care...is already taken by the present practice and regulations. The system of apprenticeship is itself good, inasmuch as it teaches in the most effectual way, that is by practice, this portion of the profession....But beyond this it does not appear its advantages extend.<sup>2</sup>

In 1846, as in certain quarters in the late eighteenth century, concern was felt at the inadequacy of the general education of attorneys, and their knowledge of the principles of the law as distinct from its practice.<sup>3</sup> The aim which Sir George Stephen set the profession in 1846 was very similar to that of the respectable attorney of 1800, and even at the earlier date some efforts were being made to achieve it. In 1807 the Society of Gentlemen Practisers was considering the foundation of a society 'for the articled clerks of members and for the purpose of discussing legal questions'.<sup>4</sup> In the provinces, the earliest Law Libraries were being established, and at Manchester a Law Students' Society was in existence in 1809.

These are signs of the ways in which the profession was developing and of the changing attitudes among the attorneys towards their calling, and they suggest that already by the end of the eighteenth century men were looking on this as a 'liberal' profession, and demanding of it standards consonant with this new status. But for a variety of reasons, among them the very nature of the attorney's employment, this was not a goal speedily arrived at. Even in 1846, when the final examination had been in operation for ten years, there was much to complain of, though it is probably

<sup>1</sup> Reports, Committees (1846), vol. x. <sup>2</sup> Ibid. p. lii.

<sup>\*</sup> Sir George Stephen told the Committee: 'I think that it is most important that the profession should be so educated as to be qualified for carrying on intercourse (i.e. with men of every class of society) as gentlemen themselves, but I apprehend that that qualification cannot be attained except by educating them as gentlemen, with much greater attention to their general endowments and information than is at present the case.' Stephen believed that not one in fifty in the profession was educated to the level of the fifth form of a public school. He may have been over-emphatic in some of his judgments, and he was not without his prejudices (cf. D.N.B.), but his evidence seems generally to have been accepted by the Committee.

A Records of the Society of Gentlemen Practisers, p. 29.

also true that by that date society was more generally sensitive and exacting in these matters than it had been fifty years before. The discussion of the problem of making an attorney was carried on at the end of the eighteenth century in language very similar to that employed in 1846, but the evidence placed before the Committee in that year is a salutary warning against any tendency to assume that by 1800 in this, as in other aspects of the history of the profession, all was sweetness and light, and that the pettifoggers were no more.

## CHAPTER VI

## THE ATTORNEY IN LOCAL SOCIETY

THE country attorney was an important figure in provincial society in the eighteenth century. His professional concerns placed him at the centre of affairs in many localities, and by the end of the century he was often to be found among the more energetic leaders of a greatly enriched provincial life. The evidence for this is scattered through all the specialised histories of the period, histories of families, estates, banking, commerce and politics. Indeed, a large part of the flesh which the local historians are attaching to the bones of eighteenth-century English history is based on documents which have come to the various record offices from solicitors' attics and strong-rooms. Even the catalogue of any one of these deposits gives a very clear picture of the great variety of ways in which the attorneys touched the life of the community in which they lived. The lists of the Tibbitts Collection at Sheffield may be taken as an example.

These are the professional papers of a Sheffield attorney of the eighteenth century, Samuel Dawson, and of his predecessors and successors in the practice. There are a great number of deeds of all kinds, principally relating to Yorkshire, but occasionally to other parts of the country. There are copies of wills, leases and agreements; papers relating to partnerships of linen drapers, runners and casters of steel; a draft agreement of twenty-seven butchers to avoid causing nuisances with the garbage from the slaughter house; appointments of the surgeon of the workhouse; the papers relating to the Earl of Shrewsbury's Hospital in Sheffield; documents concerning the Cutlers' Company of Sheffield, lead mining, turnpike trusts, the Dove and Dearne Canal, the River Dun Navigation Company, and parish business of all kinds—apprenticeship indentures of pauper children, settlement disputes, disputes about rights of way, indictments for not repairing highways. There are papers relating to various criminal cases, and to cases of slander heard in the Consistory Court at York. The concern of Dawson and his colleagues with manorial business is shown in many ways court rolls, rentals, presentments, maps, plans, and surveys are all

carefully preserved. There is evidence of the work of this firm as clerks to the Town Trustees. There are the note-books kept by the articled clerks, a pamphlet describing a plan 'to remedy the great charge and delay of suits at law and in equity', and another relating to the proper conduct to be observed by the apprentice towards 'his master and the world'.

Another Sheffield attorney was James Wheat, who practised at the end of the century. Wheat was a master in chancery, and one of the most important of some seventeen attorneys in the town. He had been articled to a local attorney, John Battie, and when Battie retired, had succeeded to his practice. In 1766 Wheat was clerk to the Capital Burgesses of Sheffield, and in 1778 he became one of the burgesses himself. He was solicitor to the Sheffield General Infirmary and the Charity Schools, and steward of the manor of Sheffield for the Duke of Norfolk. He succeeded Samuel Dawson as Clerk to the Town Trustees in 1777. He had financial interests in the Water Works, the White Lead Works, and the brewery. He was a target for the mob in 1791 because of the part he had played in securing the Cutlers' Act, and also for his concern in obtaining several local enclosure acts. He subscribed to the Tontine Inn, and was the government's agent for the building of new barracks in the town in 1702. Wheat had a large business in putting out his clients' money on mortgage, and occasionally he lent small sums himself: there are several letters from a neighbouring attorney in Paradise Square, Michael Burton, asking for loans of two or three guineas.

Wheat acted as clerk to many ad hoc bodies in Sheffield, tithe committees, the committee for building a new poor house, and to those petitioning against the Park Road bill. He was concerned in the Brightside enclosure, and negotiated with Edward Barnell in London about soliciting the bill in Parliament.<sup>2</sup> In 1777 he was appointed clerk and treasurer to the Sheffield-Wakefield turnpike in succession to Samuel Dawson, and for this he was paid an annual salary of £25, in addition to a monopoly of the legal work that

Details derived from J. B. Wheat, Wheat, a Family History (Sheffield, 1893); and from Wheat's own business and personal papers at Sheffield. See also R. E. Leader, Sheffield in the Eighteenth Century (Sheffield, 1901), pp. 190-2, for details of Wheat and other Sheffield attorneys of the eighteenth century.

It was the legal business which enclosures involved, and not so much the fees for secretarial work, that provided the profit in this kind of work. Wheat's fees for the Hallams enclosure were: 1791, £265. 11s. 8d.; 1792, £139. 19s. od.; 1793, £15. 1s. 4d.; 1797, £120. 1s. od.; 1799, £112. os. od.; 1800, £214. 14s. 5d. (W[heat] C[ollection], 1240/3).

founders in the way of estates and local bodies for which, like their predecessors, they are still concerned.<sup>1</sup> Some of them continue to occupy the same premises in a Georgian house which had formerly served their founders for both home and office.

A similar part was played by attorneys in the life of eighteenthcentury Birmingham.2 Most of the attorneys in the town appear in the local newspaper advertising property for sale. Thomas Steward was clerk to the Street Commissioners in 1761. Thomas Cecil received the money due to the weighing machine sold for the benefit of the poor. John Hallam was steward of the Carnation Show in 1775; John Meredith clerk to the builders of the canal from Birmingham to Worcester, to the Trustees for building the new Chapels of St Paul and St Mary in 1772, and the builders of the Coventry and Oxford canal in 1774; he was clerk to the Street Commissioners and the Birmingham Boat Company in 1770. Thomas Brock was secretary to the proprietors of the Birmingham Theatre in 1792; Charles Stuart clerk to the Guardians of the Standards of Wrought Plate in 1778. Thomas Gem acted as solicitor to the Committee of Button Manufacturers; Benjamin Parker was concerned for the Overseers of the Poor; William Smith was clerk to the Street Commissioners in 1791, and secretary to those enclosing Birmingham Heath in 1798, a matter in which Ambrose Mainwaring and Thomas Hunt were also employed. Messrs Barker and Unett were the solicitors to those rebuilding Deritend Bridge, to those opposed to the sale of Comin Square, to the committee of those who opposed the Water Works, and to the committee of Volunteers in 1804. Mr Simpson was Treasurer to the Button Association in 1799; John Brooke to the Church and King Club in 1702, and to the Association for the Protection of Liberty and Property. H. W. Gem acted as clerk and treasurer to the Trustees for enlarging St Martin's Churchyard in 1811; Richard Bird represented the Birmingham Union Fire Office in 1805; William Haynes, George Meredith, and John Meredith were commissioned in the Loyal Birmingham Volunteer Infantry in 1803. Lewis Thompson, who was a partner with Wrightson in the publication of the Birmingham Directory in 1808, had been an

Details derived from J. A. Langford, A Century of Birmingham Life, 1741-1841 (Birmingham, 1868), which is based on Aris's Birmingham Gazette.

<sup>&</sup>lt;sup>1</sup> There is one firm which claims direct descent from a sixteenth-century attorney; see Reginald Hine, Confessions of an Uncommon Attorney (London, 1945), and Relics of an Uncommon Attorney (London, 1951).

attorney, and returned to legal work on the dissolution of the partnership in 1812.

The local histories and newspapers of other areas tell a similar story, and show the attorney in touch with local life at a large variety of points, and occupying a position near the head of the hierarchy of the provincial town. There are many examples of this. At Helston families of attorneys intermarried and formed a sort of lesser aristocracy in the town. The families of Grylls, Roberts, Hawkins, Johns, Plomer, Sandys, were town clerks, mayors, stewards of manors, well to the fore in all local affairs.2 It was commonly believed that attorneys occupied the best houses in town,<sup>3</sup> and in King's Lynn they certainly did occupy residences appropriate to their position in the local community. There the Turners, John Mayer, Robert Underwood, Edward Bradfield, and Philip Case enjoyed such a station.4 Case, indeed, was a man of outstanding importance in King's Lynn and in Norfolk generally.<sup>5</sup> He had been apprenticed to the town clerk of Lynn at the age of sixteen in 1728.6 He was admitted an attorney in 1733, bought himself a large house in Lynn, married the daughter of a prosperous

<sup>1</sup> The profession continued to attract a wide variety of men; they were agents only, and ministered to the needs of their community, whatever they might be. William Hall, an attorney of Barnard Castle, advertised in the *Newcastle Journal* that he would take in laundry to be bleached by John Flanders of Crathorne, Yorks.

<sup>2</sup> See H. S. Toy, *The History of Helston* (Oxford, 1936), especially Appendix 30 by J. P. Rogers on 'Families connected with Helston'. See also chapter ix below on Christopher Wallis.

'A Lawyer now was to be found;
And where's the spot of British ground,
Where our experience doth not show
That such a spreading plant will grow,
And where his dwelling is not known
As the best house in any town?'

(Dr Syntax's Tour in Search of Consolation (London, 1820), pp. 170-1.) On the houses of country attorneys, see also Samuel Foote, The Orators (1762) (Foote's Lecture), and Crabbe's The Borough (1801), Letter VI, 'The Profession of the Law'.

- <sup>4</sup> See H. L. Bradfer-Lawrence, 'The Merchants of Lynn', in A Supplement to Blomefield's History of Norfolk, ed. Clement Ingleby (London, 1929), pp.145-203. For the Turners, see J. H. Plumb, Sir Robert Walpole: the Making of a Statesman (London, 1956). There is some correspondence between Walpole and Charles Turner, an attorney, in the Cholmondely (Houghton) MSS. in Cambridge University Library.
  - <sup>5</sup> Details derived from Bradfer-Lawrence.
- <sup>6</sup> His first master, Edward Bradfield, was dismissed in 1728, and Case continued with his successor, Robert Underwood. Of Bradfield it was said: 'His fine Patrimony, And a Profession wherein he excell'd, Gave him Independency, And every Enjoyment that could make Life agreeable: But alas! his accepting

doctor, Walpole's friend George Hepburn, and quickly acquired an exceedingly prosperous practice, numbering among his clients Townshends, Walpoles, Pastons, Turners, Paytons, Wyndes, Spelmans, and Beveys. After serving as deputy clerk of the peace for Norfolk, he became clerk in 1760. He was steward of many manors, and became Comptroller of Customs at Lynn, Wisbech, and Wells in 1754. He purchased his freedom at Lynn in 1733, and was mayor in 1745, 1764, 1777, and 1786. He was deeply involved in politics with Townshend at Lynn and with Townshend's son at Yarmouth. With all this he made a large fortune, and died in 1792 leaving extensive properties in Lynn and the county, and £100,000 in the funds, having from 1745 'virtually controlled the public and social life of Lynn', the valued friend and adviser of Walpoles and Townshends alike.

Similarly at Liverpool it was men like William Roscoe and his kind who took the lead in local affairs. Roscoe was articled to an attorney in 1769, and was admitted in 1774. He went into partnership first with Mr Bannister, and afterwards with Samuel Aspinall, an attorney who had 'long been known for the respectability of his practice'. Roscoe's profession became increasingly distasteful to him, and he left it in 1796, not, however, before he had achieved considerable prosperity by it, and become one of the most prominent citizens of Liverpool.

the Office of Town Clerk subjected him to Servility, And to every Disappointment That could make Death desirable' (Epitaph written by William Brown, printed in W. Richards, *History of Lynn* (Lynn, 1812), II, 915). Bradfield died in 1736 at the age of 47.

<sup>1</sup> One of his brothers, Edward, was agent to the 3rd Viscount; another brother, Thomas, was an attorney.

<sup>2</sup> See the letters printed in Bradfer-Lawrence, op. cit. pp. 193-9.

<sup>3</sup> Bradfer-Lawrence, op. cit. p. 200.

<sup>4</sup> Dr Chandler quotes a poem from the Roscoe Papers with reference to the part played by Roscoe and his friends in local affairs:

'But unluckily then in the Town
Attorneys were great politicians
And quakers were men of renown
And merchants were metaphysicians...
They'd one family make of all nations
A state without members they'd rule
And vote me and a negro relations.'

(George Chandler, William Roscoe of Liverpool (London, 1953), p. 52.)

<sup>5</sup> Henry Roscoe, Life of William Roscoe (London, 1833), 1, 43.

<sup>6</sup> See the letters Roscoe wrote to his wife, printed *ibid*. pp. 205-6: 'I am almost disgusted with my profession as it affords me a continual opportunity of observing the folly and villany of mankind.'

At Bristol the attorneys were closely associated with the trading community in the city, and they were quick to subscribe to the fund raised to assist the king against his rebellious subjects in America.1 An attorney was clerk to the Merchant Adventurers' Company; another, Henry Bengough, became mayor in 1792. And there were many other eminent attorneys in the city. One of them, Jarrit Smith, was the city's member of parliament from 1756 to 1768. He is said to have been helped in his campaign by Wesley; he became a baronet in 1768, and changed his name to Smythe. Thomas Fane, Distributor of Stamps, Clerk to the Society of Merchants, became heir to the Earldom of Westmorland in 1757, and resigned his practice to his clerk, Samuel Worrall, who was later town clerk and head of a firm of bankers in the city until he went bankrupt in 1819.2 In contrast to these men, Peter Baynes, an attorney prohibited from practice for non-payment of fees, was employed by one Barry, an unscrupulous inn-keeper on the Quay, to draw up deeds by which sailors who were indebted to him assigned to him their wages and prize-money on their deaths.3

The activities of the attorneys reflect very closely the distinctive character of the local history of the area within which they practised. The special problems of cathedral towns, of university towns, of sea-ports and industrial centres all appear from their papers. In Lancashire the peculiar situation of the Roman Catholics provided much work for the profession. Suffering under many disabilities about holding property and the like, Catholics were often forced to rely on the personal discretion of their attorney. Protestant neighbours held their lands for them under trusts arranged by attorneys, and except at critical periods such as those immediately following the '15 and the '45, the relations between Catholics and their neighbours seem to have been amicable. But their position was never secure, and they depended much on legal advice.

<sup>&</sup>lt;sup>1</sup> See above, p. 37; other details relating to Bristol are derived from John Latimer, *The Annals of Bristol in the Eighteenth Century* (Bristol, 1893).

<sup>&</sup>lt;sup>2</sup> See L. S. Pressnell, Country Banking in the Industrial Revolution (Oxford, 1956), p. 240.

In 1745 a sailor died in Barry's house under suspicious circumstances, leaving a will which made over to Barry £2000 prize money. At the trial Baynes deposed that 'after the privateersman had expired, Barry's wife put a pen into the dead man's hand, and thus made a mark on the blank form of will which was at once filled up in Barry's favour by Baynes himself, who admitted that several hundreds of sailors' wills had been written by him at Barry's dictation after the man had left the port' (Latimer, op. cit. pp. 261-2).

The family of Starkie who were attorneys in Lancashire during the century proved good friends to many Catholic families. In 1701 Starkie advised Robert Scarisbrick 'to go into Cheshire or Yorkshire or anywhere else out of the county' to avoid the impending summons for recusancy. Similarly in 1708, another attorney, Nicholas Plumb, wrote to Edmund Blundell telling him of an information laid against Mr Blundell of Ince Blundell by Parson Ellison of Formby. Plumb was able to work things in Blundell's favour at Ormskirk sessions, and again in 1716, when Blundell and his family found it advisable to leave the country, Plumb and his son William, who practised as a lawyer in London, helped them to obtain permission to leave. The family was home again in 1717, and Plumb was advising them about the re-registration of their real estate.

Other attorneys were preoccupied with different aspects of Lancashire life. The precedent book of a Liverpool firm contains, besides the usual references to causes arising from wills and deeds of all sorts, opinions about questions of marine insurance, the

<sup>1</sup> Blundell's Diary and Letter Book, 1702-28, ed. M. Blundell (Liverpool, 1952), p. 76.

- <sup>2</sup> Blundell, op. cit. p. 75. The position of Catholics was precarious, and they were open to the attacks of informers. Charles Butler, an eminent Catholic conveyancer, wrote: 'On an inquiry made in 1780, respecting the execution of the penal laws against the Catholics, he found that the single firm of Dynely and Ashmall, attornies in Gray's Inn, had defended more than twenty under such prosecutions; and, that, greatly to their honour, they had defended them gratuitously' (Historical Memoirs of the English Catholics (London, 1819), 11, 65). Catholics were not prevented from acting as chamber counsel and conveyancers, and such men as Nathaniel Pigott, James Booth, and Butler himself made a large contribution to the theory and practice of conveyancing. Butler was secretary to the Catholic Relief Committee at the end of the century, and was the first Catholic to be called to the bar after the act of 1791 (31 Geo. III, c. 32) which removed the disabilities on Catholics practising as attorneys and barristers.
- their trust. A letter from Edward Starkie of 6 March 1760, claiming the Lydiate estate of Lady Anderton under her will (Lancashire Record Office, D/D In 14/35), was endorsed by G. Blundell in 1891, 'Letter from the rascally son of the lawyer to whom Lady Anderton made over Lydiate for her son-in-law's family, the Blundells of Ince'. The estate seems to have been entrusted to Starkie, who then refused to hand it over to the Blundells. But there are further suggestions that Starkie did make a search for the son of Henry Blundell in order to give him some money from the estate (D/D In 14/41 and 44). There was a similar situation in Northumberland in the early part of the century, described by Scott in Rob Roy, and Diana Vernon, speaking of the activities of Attorney Jobson, justice's clerk to Squire Inglewood, called him a 'troublesome mischief-making tool', and said, '...it is hard that persons of birth and rank and estate should be subjected to the official impertinence of such a paltry pick-thank as that, merely for believing as the whole world believed not much above a hundred years ago...'.

importing of goods from Ireland, articles of agreement with seamen to sail to Africa, and many other matters which arose in Liverpool at a time when its importance as a seaport was being rapidly established.¹ Another Lancashire attorney, Isaac Greene,² was connected with the Corporation of Liverpool, acted as attorney for Lord Molyneux, advised Liverpool merchants about investments, and assisted Richard Norris at election times. He went to London on behalf of the corporation to assist the local members to obtain an act to make the River Weaver navigable so as to open up the Cheshire salt trade,³ and to obtain payment from the Treasury for the cost of fortifying the town in 1715. Greene made a large fortune, bought up much land in Lancashire, became a landed gentleman—and died intestate.

Another Lancashire attorney of the first half of the century was Alexander Leigh. Leigh had a large practice, and was the attorney and election agent in Wigan of Sir Roger Bradshaigh. In 1733 he was steward or clerk of seventeen manorial courts... was deeply involved in the Douglas Navigation project, and thereby concerned in the Lancashire coal trade. He was mayor of Wigan in 1727 and again in 1737. He was town clerk from 1732 to 1735, was succeeded in this office by his son Robert, who held it from 1735 to 1741, and was in turn succeeded by his nephew and clerk, John Wiswall. With his father-in-law, Robert Holt, Leigh 'formed the channel for appeals from the locality for Sir Robert's patronage'.

In a neighbouring county, the account book of a Chester firm of attorneys, in which Charles Potts was a principal partner, shows them engaged for the clerk of the peace at the sessions, concerned in the usual attorney's business in parish affairs, borrowing money for their clients, collecting their clients' money out on loan; advising

<sup>&</sup>lt;sup>1</sup> I was able to see this book through the courtesy of the Underwriters' Association of Liverpool.

<sup>&</sup>lt;sup>2</sup> See R. Stewart-Brown, Isaac Greene, a Lancashire Lawyer of the Eighteenth Century (Liverpool, 1921). I owe this reference to Professor H. J. Habakkuk.

<sup>&</sup>lt;sup>3</sup> Another attorney, William Watts of Middlewich, was employed by those opposing the scheme. Cf. T. S. Willan, *The River Weaver in the Eighteenth Century*, Chetham Society, 3rd series, III (Manchester, 1951), 12–15, 17–18. Richard Vernon, a prosperous attorney of Middlewich, with interests in the salt trade, was one of the undertakers of the navigation named in the Act of 1721 (7 Geo. I, c. 10) (Willan, *op. cit.* pp. 24–6).

<sup>&</sup>lt;sup>4</sup> See M. Cox, 'Sir Roger Bradshaigh and the Electoral Management of Wigan, 1695–1747', Bulletin of the John Rylands Library, vol. 37, no. 1 (1954), pp. 120–64

<sup>64.

8</sup> Holt was mayor in 1730 and 1736.

about the titles of estates; doing business in Cheshire on behalf of London and Liverpool attorneys; obtaining the conviction of poachers of rabbit warrens and of several persons accused of infringing customs regulations; arranging insurances and enclosures. One client, Mrs Frances Williams, ran up a bill of some £400 with Potts. He looked after her investments, settled her late husband's affairs, paid the land tax, the window tax, and the duty on plate; put out her money on loan and bought Scotch bonds for her; paid certain dues on her Carmarthenshire estates to the Bursar of Jesus College, Oxford.

Potts advised Walter Thomas of Chester in his long dispute with Lady Cunliffe about the obscuring of his windows by the Sugar House, and went up to London to hear a cause relating to his ore mines in Wales. He acted in a dispute between the Dee Company and the Canal Company, and between the Dee Company and the Mayor and Citizens of Chester. Perhaps the most interesting of Potts's clients was the Duke of Bridgewater. It was at this time that he was building the Grand Trunk Canal to connect the Mersey to the Trent, and Potts was employed to do all the conveyancing which was involved.<sup>1</sup>

On the other side of the country, in Colchester, William Mason had a rather different practice. A series of very detailed account books survives and from those for the period 1785 to 1795 a picture of his daily business can be obtained. The overwhelming majority of Mason's clients came to him for advice and assistance in the purchase and sale of land. At times he conducted these negotiations personally from start to finish, but most often he was called in after the bargain had been made, to draw the conveyancing deeds. In most cases also he had the further task of arranging the mortgages that were involved. The sums mentioned in those transactions vary considerably; one is as small as £50: most are much larger. There are several of £1000, three of £2000, one of £3500, and one of £4582. In only one instance does Mason himself seem to have provided the money needed: in 1791 he lent £130 to a client to repay a previous loan on a mortgage which had been called in.

There are a good many instances—they occur regularly at sessions time—when Mason acted on behalf of parish officers or the clerk

<sup>&</sup>lt;sup>1</sup> This information is derived from an account book lent me by Charles Potts's descendant who continues to practise in Chester. Potts was also county treasurer for Cheshire; cf. Willan, op. cit. p. 106.

<sup>&</sup>lt;sup>2</sup> E[ssex] R[ecord] O[ffice], D/DEl B 4-18.

of the peace. Such business usually took him into court, as also did the occasional prosecutions for debt, theft, assault, highway robbery, trespassing, defamation, and perjury. Most of his business, however, did not involve him in court cases, and was concerned with wills, settlements, and deeds of all kinds. There are entries recalling journeys in the middle of the night to make the will of someone not expected to live until the morning. 'You being in an alarming state, journey over to you in the night to make your will.' 'You having sent for me in a hurry to make Mr Keye's will, journey over for that purpose, but he being of an insane mind, after waiting there the night, nothing could be done.'

A regular and profitable client was John Round, himself an attorney, on whose behalf Mason held several manorial courts of which he was steward. His fees on these annual occasions were always substantial: £84. 3s. od., £100. 12s. 4d., £75. 11s. 11d., £84. 2s. 3d.1 Mason also acted for the Frating and Winstree Associations, formed for the protection of the property of their members. The client whose affairs occupy most space in these accounts is the Revd Mr Corsellis of Wivenhoe. His business is carried over from page to page, and from volume to volume: from September 1788 to March 1791 his bill had amounted to £126. 7s. 5d., principally made up of small sums charged for business with a difficult tenant, business which eventually was introduced into the Court of King's Bench. And, after a long series of discussions with counsel, preparing cases for opinions and engrossing deeds, and the like, Corsellis decided not to proceed to trial.

In 1790 he decided to make a new settlement on his wife, and an exchange of his property with his son. This meant going up to London to seek the advice of counsel—Leake and Mansfield—and Mason was given the task of putting his client's papers in order and of accompanying him to London. Mason charged a guinea a day for his attendance in London, in addition to coach hire and other incidental expenses. There were other matters which brought them back to London again in the following year. Corsellis was Mason's most frequent client, but the larger sums among the various items which make up his bill are usually payments for the opinions of

<sup>&</sup>lt;sup>1</sup> When Round died in 1813, Mason's son (who had succeeded his father as town clerk of Colchester) was appointed to several of these stewardships, although Round's successor, his nephew Charles Round, had asked for them.

counsel; Mason's own charges for writing and engrossing and journeying about on Corsellis's business are made up of small amounts of 3s. 4d. and 6s. 8d.

Mason's other clients seem to have been farmers and landowners of moderate wealth. There was a sprinkling of professional people and smaller tradesmen—a hatter, a fishmonger. But he did some business for people of a higher status such as Sir William Rowley and Sir Edmund and Lady Affleck. Occasionally he was employed by an attorney from outside the county to conduct cases at the Assizes, but for the most part his clients came from Colchester and the surrounding district of north-east Essex.

The practice of Samuel Meddowes at Halstead was even more limited. His account book for the years 1770-5 has survived, but only some 110 clients are mentioned during this period. By far the largest part of his business was connected with the purchase and sale of land and other property, and with arranging small mortgages —the largest sum he was asked to obtain was £200. Thirteen entries relate to the making of wills and the winding up of estates, twelve to the recovery of debts, thirteen to the administration of estates serving ejectment notices and making distraints, eleven to mortgages. Three entries concer nmarriage settlements, one of which was that between the Revd Mr Houghton and Miss Moss, which had to be laid before Charles Gray of Colchester for his perusal, and involved consultations with a broker about investments in the funds. Only two entries relate to parish business. Meddowes's clients were of very humble standing when compared with such men as the Duke of Bridgewater, but they too had their problems which involved matters of law, and could afford a lawver to look after them. Meddowes's charges may have been more moderate than most; he was not over-exacting in his demands, and left several debts to be collected by his successor, Samuel Alston.

Very different was the career of Thomas Nuthall, the attorney of William Pitt and many other leading figures of the day. Nuthall held many valuable offices in addition to his normal practice. He was registrar of warrants in 1740, receiver-general for hackney coaches in 1749, solicitor to the East India Company in 1765, solicitor to the Treasury in 1765, and secretary of bankrupts in 1766. In 1766 also he had been appointed Ranger of Enfield Chase, a position in which he displayed much zeal in planting and caring

<sup>&</sup>lt;sup>1</sup> E.R.O. D/DQM.

for the oaks.<sup>1</sup> Chatham employed Nuthall as an intermediary in his attempts to form an administration in 1766, and in May wrote to thank him for his 'unlawyer-like zeal for your friend'.<sup>2</sup>

Nuthall himself had much to be thankful for, and for such a client as Chatham he could hardly be other than zealous. But there are signs of dissatisfaction later. In 1772 there was a dispute about a mortgage of Hayes which Temple and Chatham were inclined to blame on Nuthall. The fault was indeed his, for he had omitted a whole parcel of lands from the mortgage deeds which he had drawn up. 'Here is a story', Chatham wrote, 'of a mistake to me quite incomprehensible, had I not often found that lawyers, hurried by variety of business, are the most stupid blunderers imaginable.'3 Temple's reply was no more complimentary to Nuthall:

At my return to this place (Stowe) on Sunday last, I found your Lordship's letter, together with one of the 4th from that facetious man of business in so many departments, Mr Thomas Nuthall, whose fellow is not easily to be met with: witness your marriage settlement not witnessed, his peremptory and repeated assertions, that your trustees had no power to advance the trust money on mortgage, even though I quoted the very words to him, and his late unparalleled proceedings, which the better to ascertain I send you the copies of the letters which have already passed, leaving the comparison of his letters to you and me, the dates, the contradictions, and the comments to your lordship.... I rely with the fullest security on your lordship's honour, but not at all on Mr Nuthall's law.4

In 1775 Nuthall died as a result of an attack by a highwayman, and in July Horace Walpole noted in his Journal, 'Just now the widow of Nuttall, solicitor of the Treasury, who had embezzled £19,000, had a pension of £300 a year to induce her to give up her husband's papers, who had been engaged in many election matters'.<sup>5</sup>

<sup>&</sup>lt;sup>1</sup> Nuthall wrote to Chatham on 21 June 1768: 'I hope I shall leave behind me innumerable proofs, that with care and common honesty in office, the fleets of this land may be supplied from the King's forests and chases only. I had rather this should be written on my monument, than any one compliment that can be given to the last peace' (Chatham Correspondence, ed. W. S. Taylor and J. H. Pringle (London, 1840), II, 424-5).

<sup>&</sup>lt;sup>2</sup> Ibid. p. 419, Pitt to Nuthall, 11 May 1766.

<sup>&</sup>lt;sup>3</sup> Grenville Papers, ed. W. J. Smith (London, 1852), IV, 543; Chatham to Temple, 30 August 1772.

<sup>4</sup> Ibid. IV, 545; Temple to Chatham, 8 September 1772.

Last Journals, 1, 469-70.

Attorneys of the eminence of Nuthall were clearly exceptional, but there were a few others—John Robinson, Jack Robinson of the Treasury, and Brass Crosby, M.P. for Honiton and Lord Mayor of London in 1770, for example—who held positions of national importance. There was a sprinkling of attorneys in the House of Commons, but the fact that they did not reach the House until fairly late in life suggests that they too, like Nuthall and Robinson, owed their positions to some patron or other, rather than to the fact that they were attorneys, although it was clearly as attorneys that they were useful to their patrons in the first place.¹ But there were many others, like Mr Goodman, 'who lives in Pall Mall and keeps both Chariot and Phaeton, and Fame says has got 20 to £60,000 by Matrimony',² who made their mark in the social life of London.

Any assessment of the importance of all this work is difficult, for in most cases the attorneys were only the agents of other men, and a valuation of this sort would perhaps emerge more clearly from a study which viewed the profession from the point of view of society, than from one which looked at society from the attorney's office. Attorneys were often despised because they were merely agents, but such criticisms became less and less apt in a society whose structure was changing so fundamentally, and in which many new pieces of social machinery were being found necessary. In a simple society middle-men may perhaps justly be despised as parasites, but eighteenth-century English society was not simple, and by the end of this period there could be little doubt that its 'agents' played an essential part as a sort of social lubricant. Without them the social changes of the period would have taken place less quickly and less smoothly.

So it was perhaps easier than it had been for attorneys to justify their calling as useful and therefore honourable, the more so since they filled so many places which were later to become the preserves of more specialised professions. And if the profession was found to be honourable, it was also found to be profitable. It certainly attracted a wide variety of men, but the great majority of them

Out of some 700 lawyers in the House between 1734 and 1832, thirty-nine were attorneys and solicitors. See G. P. Judd IV, *Members of Parliament*, 1734–1832 (Yale, 1955), p. 51; Mr Judd also notices that 'Attorneys and solicitors did not receive their first election until they had reached the average age of 48' (*ibid.* p. 52).

<sup>&</sup>lt;sup>1</sup> Verney Letters of the Eighteenth Century, ed. M. M. Verney (London, 1930), 11, 289 (Archdeacon Heslop to Lord Verney, 6 April 1787).

occupied—and maintained—a position in the middle ranges of society, and formed part of what was perhaps a new social class. It was certainly new in its self-consciousness, and in the place it was accorded in society as a whole. As has been shown, these men were already among the leaders of provincial society, and in 1800 they were only entering on a role whose period of major influence lay in the future. But even at that date, they had established themselves in a position of strength, and the respectability of their calling was conceded.

## CHAPTER VII

## ESTATES AND ELECTIONS

GIVING evidence before the Select Committee on Legal Education in 1846, Sir George Stephen, an attorney and solicitor, said: 'It is quite impossible to define within a narrow compass the nature of a solicitor's business: it extends to anything, it extends to everything: law, I should say, forms about the least part of the duty of a solicitor in a large practice.'1 What was true in this matter in the nineteenth century was at least equally true in the eighteenth, before the specialisation of activities which resulted in the development of many distinct professions. It was certainly true that the part of the attorney's business which involved him in court cases was a small part of his normal activities. A very much larger part of his time was spent in organisation and administration in many different capacities, and perhaps the greatest single source of business and of profit was his concern with landed property, and all the problems it involved. It was from their work in these important fields that the attorneys derived much of their profit and their prestige. In view of the paramount importance of land at the time, this is not surprising. Land was the foundation of wealth and of many social attitudes and aspirations; it was directly connected with local and political influence.<sup>2</sup> The laws regulating tenures and inheritance were many and complicated, the subject of innumerable treatises and hand-books, and the source, it was alleged by landowners, of much unwarranted profit to lawyers.<sup>3</sup> The buying and selling of even the smallest estate might involve complicated legal problems, prolonged investigations of the title deeds, and the drawing of long and intricate conveyancing deeds. In the case of a major estate, these problems were all multiplied, and they were exacerbated by involved settlements, trusts, and all the rights and duties inextricably linked up with landed property.

All this meant that the services of a legal expert were desirable,

1806).

<sup>&</sup>lt;sup>1</sup> Reports, Committees (1846), x, 141.

<sup>&</sup>lt;sup>3</sup> On this, see Sir Lewis Namier's remarks on land as the basis of citizenship in *England in the Age of the American Revolution* (London, 1930), pp. 20-9.
<sup>3</sup> On the land laws, see Sir Frederick Pollock, *The Land Laws* (3rd ed. London,

even in matters involving only a few acres of land; in those which involved an estate of any size and significance, they were indispensable. It may be true that the eighteenth-century landowner was more closely acquainted with matters of the law than his successors, but it seems unlikely that many of them commanded either the knowledge, or the time, or the inclination to undertake all the business connected with their property. Thus the lawyer who was entrusted with the purely legal business might also be put in charge of the day to day administration of a great estate as well.

In some cases—and this is perhaps truer of the early part of the century than the later—he did no work save for his immediate employer, and lived in his house. John Fox, for example, the steward to the Russells and their chief agent at the beginning of the century, had his room in the family house in Bloomsbury.¹ He was a bachelor and lived in, and was accorded a respected place in the household hierarchy.² Daniel Eaton occupied a similar place in the household of the Earl of Cardigan.³ In this, as in other spheres, these men were partly paid by a fixed salary, and partly by being given a monopoly of all the legal business which arose from the estate. The fixed sum was not large; John Fox received £100 per annum as legal adviser to the Russells, and £100 as receivergeneral. Daniel Eaton's predecessor at Deene received £100 per annum as steward.

Daniel Eaton found this salary inadequate, and supplemented it by doing business outside the Brudenell estate. In 1727 he wrote to the Earl of Cardigan telling him that he had recently got himself admitted an attorney of the Court of Common Pleas, 'an attorney of credit making a certificate of my capacity and producing one of my letters in court, got it done without any manner of difficulty, and with very little charge'. He hastened to explain his reason for taking this step:

<sup>&</sup>lt;sup>1</sup> G. Scott Thomson, The Russells in Bloomsbury (London, 1940), p. 208.
<sup>2</sup> The report of the funeral procession of the Duke of Somerset in the Newcastle Journal for 7 January 1749, gives the order of precedence in a large household. Before the coffin 'first went 12 persons in black clothes, then 4 of his Grace's footmen in black, after them 4 Gentlemen in black, then Mr Rhodes, his Grace's Apothecary, and Mr Guidot, his solicitor; next followed the Rev. Mr Barnard, Fellow of St John's College, Cambridge, his Grace's domestic Chaplain, after him walked Thomas Elder, his Grace's principal Steward, bearing a Ducal crown upon a cushion of crimson velvet, supported by Mr Williams, his Grace's Secretary, and Mr Gardner, his domestic Attorney'. Then came the coffin.
<sup>2</sup> Joan Wake, The Brudenells of Deene (2nd ed. London, 1954), pp. 210-22.

Your lordship may probably think I have some strange views by the proceeding, but I do assure your lordship that the chiefest inducement to it was that, whereas I have for these seven years past disposed of a great deal of money upon mortgages, etc., to the general satisfaction of all my friends who have entrusted me as well as my own advantage, my just fees have sometimes been denied, and I, having no authority to proceed, could not redeem them by law.

Now that case is altered, for I have an attachment of privilege signed and sealed, and I hope may some time or other be of convenience to your lordship. But I shall not endeavour to practise in any other way, for, as to your lordship's house being pestered by my clients (which might probably be very numerous) must certainly be irksome to you, so, consequently I could never propose any such thing to myself.<sup>1</sup>

The functions of steward, estate agent, and legal adviser, were not clearly separated, and sometimes they were performed by the same person, who seems very often to have been an attorney. It has been suggested that it was in the eighteenth century that the specialised estate agent first appears, being needed to cope with the increasing complexity of estate administration, and the geographically scattered nature of the estates of the great landowners.<sup>2</sup> There are important examples, however, of estate management being carried on by men who had attorneys' practices.<sup>3</sup> Indeed it would have been surprising if they had not been found performing a duty for which they had so many professional qualifications. The management of the scattered parts of a large estate seems frequently to have been entrusted to a local attorney, and even the central

<sup>&</sup>lt;sup>1</sup> Brudenell MSS. Fiii 123; quoted Wake, loc. cit. The second edition of Miss Wake's book contains a portrait of Eaton.

<sup>&</sup>lt;sup>8</sup> E. Hughes, 'The Eighteenth Century Estate Agent', in *Essays in Honour of J. E. Todd*, ed. H. A. Cronne, T. W. Moody, and D. B. Quinn (London, 1949), pp. 188-9.

This of course antagonised those who were anxious to keep attorneys out of this business. In 1727 Edward Laurence wrote: 'I cannot forbear here to take notice, that Noblemen and Gentlemen lie under great Evils and Inconveniences, when they suffer themselves to be persuaded to employ Country Attorneys for their Stewards; because it seldom happens that they are well Qualified for that Trust... A Steward's Business is not such as may be done as it were by the by: 'Tis his whole Employment, and a full one too;...the Attorney, if he has any Character, has business enough of his own, of the Law, and therefore should not undertake the Office of Steward... I have known Instances where a Country Attorney has been Steward to seven or eight Noblemen, and others, and has yet done nothing else but attend the Court-keeping and collecting of Rents; by which means the Tenants have taken the Advantage of doing what they would with their Farms, quickly lessening the Value of the Estates by Over-Ploughing, etc....' (The Duty of a Steward to his Lord (1727).)

direction of an estate as large as that of the Rockinghams was entrusted to a Yorkshire attorney, Richard Fenton, and his successor, Charles Bowns, both of whom did similar business for other landowners, and some normal attorney's work besides.

Fenton corresponded with Rockingham on all matters relating to the estates, especially those in Yorkshire, and to politics in Yorkshire. He occupied a position of great responsibility and trust: between 1760 and 1765 he received more than £60,000 in rents from the Rockingham estates at Badworth, Malton, and Wentworth, out of which he financed the running of the estate and the household, and remitted large sums to Rockingham in London. In the years immediately after Rockingham had succeeded, however, the annual rents were not sufficient to pay all the demands on the estates, encumbered as they were by debts and annuities, and Fenton had to borrow money to keep things going. He wrote to his master in 1765: 'I do assure you, my Lord, I have at several different times borrowed sums of money in my own name and security, and which I still owe, to discharge demands at Wentworth, which could not reasonably be deferred longer.'

Fenton reported regularly about estate matters. On 14 November 1765, for example, he wrote to tell Rockingham about the purchase of two estates, and sent an account of his receipts and payments since his last letter. He discussed arrangements for paying debts incurred at Wentworth for hay and other things, and asked that money should be sent to the household steward to tide him over till the Christmas rents came in.

The taking away the hill,<sup>2</sup> and the turnpike work have been very expensive jobs. Were all the present demands cleared off, things might probably be kept for the future on an equal footing—but this I found not possible to be done—because there were some large bills standing out when Mr Evans<sup>3</sup> left your lordship's service, and because I have since at different times had orders from your lordship for several considerable extra sums; when the bills are now discharged, which most certainly would only be right to have done immediately, I should think that the common disbursements, including what I pay for interest money, etc. would not exceed the rents there.<sup>4</sup>

<sup>&</sup>lt;sup>1</sup> W[entworth] W[oodhouse] M[uniments] R 171/5, 3 November, 1765. Fenton was also a receiver of the land tax. He lived at Bank Top, Barnsley.

<sup>&</sup>lt;sup>2</sup> Wentworth Woodhouse, the largest house in England, was begun in 1740; this presumably refers to the laying out of the park.

Presumably Fenton's predecessor. W.W.M. R 171/4.

There are signs that Fenton did not think himself adequately rewarded for his devotion to Rockingham's interests. On one occasion he asked Rockingham to use his influence to get him appointed clerk of the peace. What his salary was does not appear, but the connection was a valuable one, and he remained in this position for some thirty or forty years. He retired about 1790, and was replaced by Charles Bowns, who seems to have taken over his practice as a whole. Bowns acted as Fenton had done, and like him, thought himself underpaid by Rockingham's heir, Fitzwilliam. It was not until 1811, however, that he asked for an increase in his salary. He wrote on 4 June, describing his affairs, and giving interesting details about his relations with other landowners for whom he acted as agent.

The agencies I hold have necessarily occupied so much of my time that it has not been in my power to pursue the profession of a solicitor to that extent which is sufficient to enable me to answer the growing expenses which I experience, and which my limited income has not been equal to, on which account I have been obliged to request an increase of salary from Colonel Beaumont and Mr Tullerton which they have granted, and must inevitably have made the like application to your lordship four years since had I not been favoured with your lordship's professional employment, for which I take this opportunity of tendering my most grateful thanks. I have also been desirous of deferring the application until such time as an advance should take place in the rents of your lordship's estates in my collection.

The salary which Colonel Beaumont allows me upon the amounts of the rents, etc., which includes the auditing the accounts of the House Steward at Bretton and of the principal head agent at Newcastle, where I go annually at his expense, but all incidental business not relating to the estate is paid for as professional, being too uncertain to compound for.

Mr Tullerton makes me the like allowance of 4%.

The annual amount of the rents and produce of your lordship's farms, tithes, mines, woods and canals under my collection is little if anything short of £40,000 and the quantity of land exceeds 15,000 acres, the cultivation and cropping of every close of which, as well as the state of the buildings thereupon must be attended to every year, in consequence of the mode of management prescribed by the intended articles with the clients;<sup>2</sup> to which must be added, the auditing of Mr Birnam's

<sup>1</sup> Bowns was undersheriff for the county to Sir George Wombwell, and appointed Joseph Munby his deputy in 1809. Letter of Attorney in Munby MSS.

<sup>&</sup>lt;sup>a</sup> Improvement clauses in the leases granted to tenants were increasingly popular, and their insertion and proper operation called for a good deal of expert knowledge on the part of the agent.

(steward at Wentworth) accounts—the accounts of Law Wood and Elsicar Collieries, and likewise those of the Irish, Malton, Higham, and Harroden estates; for all of which I take the liberty of humbly requesting your lordship will be pleased to make such augmentation to my present salary as your lordship may think proper, upon consulting with any professional gentleman acquainted with business of that kind, and to whom I beg leave to refer your lordship, in order to ascertain what sum may now be fair, reasonable, and adequate compensation for the management and attention required upon an estate of the magnitude and nature of that which your lordship is pleased to entrust to my care.<sup>1</sup>

Fitzwilliam seems to have received this request sympathetically. He consulted Mr W. Baldwin of Brook Street about it, who suggested that Bowns should be given £1200 per annum, and added: 'I do verily believe that by his £400 per annum he has not been much benefited.'2

Not all agents were held in such high esteem. The position offered scope for cheating and some agents were not able to resist the temptation. Thomas Carter, an attorney of Leicester, was steward to Mrs Brent, and in 1725 the Revd Mr Robertshaw was asked to investigate his affairs on Mrs Brent's behalf. He discovered that Carter had been claiming sums for repairs which had never been done, and he asked Carter to come over to Amersham to sort out affairs before they became publicly known. 'He was', Robertshaw wrote, 'fool enough to offer me a sum of money to get the vile affair hushed up.' Carter blustered and threatened for some time, but Robertshaw was able to obtain conclusive evidence against him. 'He then began to change his note, and confess that he had done wrong, and that it was in our power to ruin him with all his other clients, many of whom were persons of great quality and distinction.' In the event, 'he gave bond to refund Mrs Brent six hundred guineas in a year and a half's time, viz. £105 at each quarterly payment; which he actually performed within the time limited, and was contented to be turn'd out of his stewardship into the bargain'.3

<sup>1</sup> W.W.M. F 106 a.

<sup>&</sup>lt;sup>2</sup> In the same year Heaton, the agent of the Duke of Devonshire, who had been with the family for more than forty years, had his salary of £1000 increased, and was given £1000 besides. On this occasion Lady Bessborough recommended to Lord Granville the method of paying an agent by allowing him a percentage on the rents in his collection. See Hughes, *loc. cit.* p. 193.

<sup>&</sup>lt;sup>8</sup> Shardeloes Papers, ed. G. Eland (London, 1947), pp. 64-7.

It is probable that many landowners harboured suspicions that all attorneys and agents would behave in this manner whenever they had the occasion. Certainly Lord Shelburne did. In a memorandum which he drew up on the problems of the management of land in Ireland and England, the principal burden of which was contained in the rules 'put yourself in the power of no man', and 'see with your own eyes', he showed himself no friend to the professions, and suggested that the natural interests of landowners and those of their agents were necessarily in conflict. He had no great opinion of the abilities of the generality of professional men, and thought that 'want of time and application are the real causes of the perpetual blunders, which are to be found in every transaction of business (and I believe there is not a settlement in the kingdom without some),2 much more than the policy which is supposed to prevail in all trades, of making business for their own endowment, or any positive dishonesty among agents'.3

Shelburne went on to suggest that a closer supervision ought to be exercised by landowners in person—'The eye of the most ignorant owner operates upon his agents like witchcraft'4—and that they could do much of the work themselves that they were used to entrust to others.<sup>5</sup> When landowners neglected their estates, and left them in the hands of agents, both they and the society which depended on them were bound to suffer. 'Though the rich may in some respects set a bad example', wrote Shelburne, 'yet upon the whole they soften and liberalise, excite industry, and make society by bringing men together, who polish themselves, enforce a due administration of justice, and keep down the professions, whose employment is to rob every country, and if left to themselves, naturally produce upstart manners and yet a total want of principle.'6

It was just this development that was responsible for the profits of attorneys, and for their increasing importance in society, along with other kinds of professional men. Those who could afford to engage an

<sup>&</sup>lt;sup>1</sup> This memorandum is printed in Lord Fitzmaurice's Life of Shelburne (2nd ed. London, 1912), 11, 336-7.

<sup>&</sup>lt;sup>2</sup> Cf. the views of Chatham and Temple, p. 81 above.

<sup>\*</sup> Fitzmaurice, op. cit. pp. 340-1. 
4 Ibid. p. 341.

<sup>&</sup>lt;sup>6</sup> Cf. *ibid.* p. 347: 'Of all the follies the greatest is that, which formerly was practised and is still continued in some great families, that of having some considerable lawyer or some eminent man of business at a considerable salary to audit your accounts. There is a family whose fortune was entirely made by the father's auditing the accounts of different estates, which many of the owners were infinitely more capable of auditing.'

<sup>6</sup> *Ibid.* p. 361.

agent to perform those functions which they themselves found too irksome or too complicated, and in doing so, allowed the attorneys to prosper, and to develop into a professional class with its own interests and its own powers. And the attorneys on their part exploited the possibilities of being—or of being thought to be—indispensable.

All agents were liable to be plunged into hectic activity at critical periods in the affairs of their employers. The prolonged dispute between Sir James Lowther and the Duke of Portland over the right to the Forest of Inglewood kept many lawyers, great and small, busy for ten years. At an advanced stage in this dispute, in 1771, the London Packet noted that the 'suit (is) in such favourable train that the bar may reasonably expect that a three years' crop will yet be taken by the lawyers on both sides before a final decision can possibly be obtained'.2 In fact the dispute lasted from 1767 to 1777, and the attorneys who prepared the way for the barristers, and who gleaned the field after the bar had taken its crop, profited greatly. Lowther bought up many of the attorneys in Cumberland, and in 1770, 'Legions of attorneys, accompanied by all the sheriffs and bailiffs they could lay their hands upon, were informing all whom they thought they could terrify that they must be prepared to quit their tenancies immediately'.3 In the end, Portland's claim to the land was established, and Charles Howard, writing to congratulate him, wished him a 'Lasting deliverance from Lawyers, Doctors, and Sir James Lowther'.4 Certainly the lawyers gained much from this struggle, and if trials of strength of this magnitude occurred only once in a century, in everything but size it was typical of scores of disputes over property rights which were fought out in the eighteenth century, disputes which were caused and invigorated by the great prestige and influence which attached to landed wealth at that time.

<sup>&</sup>lt;sup>1</sup> See A. S. Turberville, A History of Welbeck Abbey and its Owners (London, 1939), 11, ch. 6.

Printed in Newcastle Journal, 25-30 November 1771.

<sup>3</sup> Turberville, op. cit. p. 122.

<sup>&</sup>lt;sup>4</sup> 10 February 1777, Letters at Welbeck Abbey (Roxburgh Club, 1909), p. 181. One of Lowther's agents in Cumberland at this time who assisted him in the election of 1768 was John Richardson, a Penrith attorney. He was the son-inlaw of another attorney, Thomas Whelpdale, and had succeeded him as steward to Portland. He was dismissed in 1763, and in consequence had espoused Lowther's cause. For his part in the election of 1768, see C. R. Hudleston's article in Transactions of the Cumberland and Westmorland Antiquarian and Archaeological Society, new series, XLIX (1950), 166-79.

This was reflected, too, in the care which was devoted to the drawing up of marriage settlements, a task closely linked with the management of a landed estate, and a further source of profit for lawvers. barristers and attorneys alike. These settlements were commonly documents of great length and intricacy, and in the case of the most complicated of them, the services of a London expert would be needed. It is well known that marriages between people of any standing in the eighteenth century were very frequently matters of interest rather than affection, 'just like other common bargains or sales, by the mere consideration of interest or gain, without any love or esteem, of birth or of beauty itself, which ought to be among the ingredients of happy compositions of this kind, and of all generous productions'. Temple considered that this was a recent development—it is certainly an arrangement of this kind that Hogarth depicted in Mariage à la Mode; and Professor Habakkuk, while he disagrees with Temple about the novelty of the custom, considers that marriages of this kind were more frequent in the early eighteenth century than they had been at earlier periods.2 And whatever may have been the harmful results to society which Temple complained of, arrangements of this sort were a source of immediate gain to the legal profession. There may have been some loss of profit to them since will and settlement disputes were perhaps fewer in the case of property so closely tied up in strict settlements, but the making of the settlement in the first place, and the supervision of trusts which was subsequently needed, left much scope for the lawyers. And it may be suspected that the life tenant of an entailed estate was more in need of legal advice about what he could do than was an owner outright. The more closely an estate was bound up the greater was the challenge it offered to legal ingenuity to get round the entail.3 Most collections of attorneys' papers appear to contain draft settlements of this kind, and even

<sup>&</sup>lt;sup>1</sup> Sir William Temple, An Essay on Popular Discontents (1701), p. 77. Cf. Fielding's Love in Several Masques (1727), 11, vi, where Sir Positive Trap described the preliminaries of his own marriage: 'why I never saw my lady there 'till an hour before our marriage. I made my addresses to her father, her father to his lawyer, the lawyer to my estate, which being found a Smithfield equivalent—the bargain was struck.'

<sup>&</sup>lt;sup>9</sup> H. J. Habakkuk, 'Marriage Settlements in the Eighteenth Century', Transactions of the Royal Historical Society, 4th series, XXXII, 24.

<sup>&</sup>lt;sup>3</sup> It was certainly a popular belief with the critics of the profession that many estates were eaten up by lawyers' fees, and the lawyers in *Bleak House* had no cause to complain of lack of business from wills and settlements.

when they concerned persons of no great social standing the law charges were likely to be substantial.<sup>1</sup>

A further position of trust and responsibility which an attorney was commonly called upon to fill was that of trustee of an estate during the minority of the owner, or during his absence. John Ambrose, who was the founder of a family firm in Essex, was appointed steward and receiver of the rents of the estate of Richard Rigby after his death, and during the minority of his heir, his nephew, Francis Hale Rigby.<sup>2</sup> He held this position until 1802, when he was succeeded by his son. The administration appears to have been completely in Ambrose's hands, and the confidence placed in him was justified, and was rewarded by substantial fees and by the respect of the owner.3 He was responsible for making all payments—thatching, painting, plumbing, bricks, coals, poor rates, and land tax. He had to deal with all the bequests made by Rigby, and to receive the rents and profits of the estates. For the year ending Michaelmas, 1708, for example, the receipts from the estates in Essex, Suffolk, Warwickshire and Bedfordshire amounted to f.4573. 4s. 9d. and the disbursements to f.638. 3s.  $0\frac{1}{2}d$ ., including a salary of £150 paid to Ambrose himself. Richard Rigby had died in 1788, leaving it was said almost half a million pounds of public money to be refunded, so great care and economy were needed in the administration of the estates left in Ambrose's hands. Some had to be sold, and Mistley Hall had to be let. All this was negotiated by Ambrose in the last years of the century, and in the years following, when young Rigby was away from home in the army, his efforts had to be continued.

<sup>&</sup>lt;sup>1</sup> There is an account of the negotiation of a marriage settlement in 'Sir Walter Calverley's Memorandum Book', Surtees Society, vol. 77 (1886), 113-15.

<sup>&</sup>lt;sup>2</sup> Richard Rigby was paymaster to the Forces 1768-84. Ambrose was admitted an attorney in 1769, and practised at Manningtree. He died in 1805, and was followed by his son, admitted attorney 1795, and his grandson, born in 1798. The papers of his firm are deposited in the Essex Record Office (E.R.O. D/DHW).

<sup>&</sup>lt;sup>2</sup> Ambrose II was jealous about his reputation, and indignant when a defaulting tenant insinuated that he was only turning him out to stir up a law suit. He wrote: 'I do assure you so far from preferring a few law suits there's nothing upon this earth I would use more endeavours to avoid; for I would not have my soul rent therewith in the manner some people are, or I think must be, upon any account whatever' (E.R.O. D/DHW C 2, Ambrose to Francis Smythies, 20 November 1792). A Francis Smythies was town clerk of Colchester at the end of the century. If it was he who was giving Ambrose this trouble, it may have been that there was some professional rivalry behind this correspondence.

All these were responsible positions, and the men occupying them or desiring them were very anxious to cultivate a reputation for professional ability and integrity. It is small wonder that they and their kind were anxious to make it plain that they did not share the attributes which society had been only too ready to bestow on the profession by its largely undiscriminating abuse. They were also valuable positions, both from the actual salaries and legal fees which they carried, but also because they placed their holders in an important position in local society as the intermediary between the landowner, on whom social obligations still lay heavily, and his tenants. Some glory was reflected from their employers on them, and when their masters were absent in London or in the army, they had to fill their places at the head of the local hierarchy.

For these reasons such positions were anxiously sought after, and for the same reasons landowners were scrupulous in choosing their agents. Some of the factors taken into consideration appear from the correspondence about filling the post of agent to Earl Fitzwilliam at Malton, made vacant by the death of James Preston in 1787. On 15 June 1787 Daniel Lambert wrote to Fitzwilliam soliciting the place and giving such an account of himself as he thought would recommend him.

I am an attorney and have resided many years in this borough, and I flatter myself with credit and honour. I am now employed to receive near £10,000 per annum rents for the gentlemen of the neighbourhood, and being upon the spot, I could transact your lordship's affairs here as well as any man...I am well aware of the importance of this charge and that your lordship's prudence will suggest the necessity of inquiring into the character and situation of any person soliciting the honour of so respectable an employment under your lordship.

He then gave a list of the people who would answer for him, and mentioned that he had lived nearly twenty years in York and was known to most persons of account there.

If your lordship should think proper to direct an enquiry concerning me, I have the greatest confidence that your lordship will find that I am not unworthy of the trust, but on the other hand, if industry, experience, responsibility, and the well-earned character of an honest man may be recommendations to your lordship, my mind tells me that you will find me to be the very man your lordship ought always to have resident here. Mr Burke and Mr Weddell (our worthy members) both personally know me. I will only add my Lord that the honour I solicit to serve your

lordship (in case you should approve of me) will crown the utmost of my ambition....I can give any security for fidelity and to account that your lordship may require.<sup>1</sup>

Several letters were written to Fitzwilliam in support of Lambert, including one from Burke. On 17 June he wrote that he did not know what the position required, but that he would pass on such applications as he received. In what he said he was naturally enough concerned primarily for the political importance of Malton.

Mr Lambert is a man of character and resides in the town of Malton, and I believe is much esteemed there. I cannot think any place circumstanced like Malton can be totally out of danger, at a time when no money will be spared and when no principle or even foresight of possible inconvenience stand in the way of receiving it. Your lordship will therefore trust your concerns with him who with an attention to your estates is best in a situation from his residence and connections as well as his general activity and influence, to prevent the entrance of competition into the only place which you can properly call your own. I believe application will be made to you on the part of very respectable persons in York. But as security is better than hope anything that will remotely shake Malton or risk it in the smallest degree ill be will-compensated by any friends made for York or the county.

Several other persons applied for the position, and Fitzwilliam insisted on having someone who was resident in the borough. Among these applicants was one Hastings who had been Preston's clerk, and had been disappointed of the office of deputy clerk of the peace which Preston had promised him. Having no other appointment, he claimed that he would be able to devote the whole of his attention to Fitzwilliam's affairs.<sup>2</sup>

His application was supported by several of the tenants, and he was eventually appointed, and held the office until 1818. Lambert, however, seems to have remained in favour, for in 1794–6, when there was a dispute among local attorneys as to who should solicit the Malton enclosure bill in parliament, Fitzwilliam considered that Lambert had claims which could not be overlooked.<sup>3</sup>

<sup>&</sup>lt;sup>1</sup> These letters are contained in W.W.M. F 78a.

<sup>&</sup>lt;sup>2</sup> From other letters it appears that Hastings had at one time been butler to Josiah Maynard, but he must have been admitted as an attorney subsequently if he envisaged acting as deputy clerk of the peace.

<sup>&</sup>lt;sup>3</sup> By 1807 Lambert had gone over, and was supporting Fitzwilliam's opponents in the election of that year. (W.W.M. F 72). See p. 100 below.

Calculations of political interest such as Burke had made were natural in appointing an estate agent, and the majority of the struggles between landowners were fought, like that between Lowther and Portland, for political reasons. The activities of attorneys as estate agents cannot be separated from those as political agents, because of the close connection between the right to vote and the possession or tenure of landed property, in addition to the importance of the landed gentry in the structure of society in the eighteenth century. Thus Richard Fenton and Charles Bowns were very closely involved in the political activities of Rockingham and Fitzwilliam. Once again, in the absence of a fully articulated professional system, it was to the attorneys that men turned to perform these duties; and, indeed, the professional political agent may perhaps be said to have sprung from among the attorneys themselves, rather than to have replaced them.

The management of the local political interests of men as influential as Rockingham and Fitzwilliam was a serious responsibility, and at election times, all other work had to be pushed into the background. Contested elections were rare, but it was not always clear until the last moment whether there would be a contest or not, and the election agents had to be prepared for anything.<sup>1</sup>

The task of the main agent was to organise the election campaign, and to marshall the forces of voters and canvassers in the localities. Richard Fenton appears to have organised the by-election at York for William Thornton in 1758, and his account with Rockingham on this occasion was written with extreme care in a large leather-bound volume.<sup>2</sup> Here are recorded the sums which were subscribed by thirty-six persons to Thornton's election expenses, which came to £2978. 10s. od. The amounts paid for 'Treats, entertainments, and other incidental charges' are also meticulously

¹ On Yorkshire politics in the eighteenth century, see the following articles by C. E. Collyer in *Proceedings of the Leeds Philosophical and Literary Society* (Literary and Historical Section): 'The Yorkshire Election of 1734', VII, i (July 1952), 53–82; 'The Yorkshire Election of 1741', VII, ii (October, 1953), 137–52; 'The Rockingham Connection and Country Opinion in the Early Years of George III', VII, iv (December, 1955), 251–75; and in *Thoresby Society Miscellany*, XLI, iv, no. 99 (1951, published 1954), 'The Rockinghams and Yorkshire Politics, 1742–61'. There is some correspondence relating to the county election of 1734 from George Phipps, attorney and agent to the Earl of Strafford, and predecessor of Fenton and Bowns, in Wentworth Papers, 1705–1739, ed. J. J. Cartwright (London, 1883). Fenton is mentioned several times in this correspondence.

<sup>&</sup>lt;sup>3</sup> W.W.M. E 219.

noted down: they amounted to £8388. 8s.  $7\frac{1}{2}d$ . The sums paid to various helpers in the election campaign are recorded; five guineas to Mr Joliffe to distribute among the mob; payments for freedoms; payments to messengers and chairmen; sums of 10 guineas each paid to three champions; I guinea to Henry Varlow, 'a hero'; £2. 4s. od. to Christopher Warton for the interest on £300 borrowed for the election. Fenton's own travelling expenses are noted, as are the sums paid by him when canvassing votes, and to poll clerks and attendants. The first statement of the election put the cost at £11,408. 14s.  $7\frac{1}{2}d$ ., and the subscriptions came to £10,923. 10s. od., leaving £485. 4s.  $7\frac{1}{2}d$ . due from Rockingham to Fenton. Later in 1759 and in 1760 further claims were made for expenses from others who had assisted, and by the end of July 1760, Fenton still wanted £547. 13s.  $9\frac{1}{2}d$ . from Rockingham.

Fenton was also concerned in the preparations for the county election of 1784 when a contest seemed likely up to the last moment. There are many letters from those who acted as agents on that occasion, putting forward claims for payment, and there is a list showing the amounts claimed by each agent and the amount which the committee finally decided to give him. Many of the agents were local attorneys—Daniel Lambert, Jonathan Danser, Fenton himself—but they were assisted by many others, chosen as were the attorneys for their local influence and connections. When the polling had begun, the attorneys among them could be more profitably employed at the booths, scrutinising the voters' franchises, supporting those on their own side, and objecting to those on the other.

There are records of the sums paid to the clerks of the peace of the Ridings, of £25 paid to the London agent, Joseph Allen, of sums paid to four 'advocates'—Fenton himself was paid £77 in this capacity—of fees to the undersheriff, counsel, and clerks. Robert Lakeland, an attorney of York, complained that his claim for expenses had been reduced from £10. 7s. to 8 guineas. 'The allowance of a guinea and a half per day', he wrote, 'may be reasonable to such attorneys as canvassed only a small circle in their own neighbourhoods and could of course sleep at home and attend to

<sup>&</sup>lt;sup>1</sup> 'Foljambe and Weddell were nominated, but declined to go to a poll the evening before the election' (W. W. Bean, *Parliamentary Representation of the Six Northern Counties* (Hull, 1890), p. 657). Wilberforce and Duncombe were returned (W.W.M. E 21).

other business; but I beg leave to represent to you that with respect to myself it is inadequate both as to time and expenses; as I was under the necessity of being from home both day and night, totally neglecting my professional business which would have paid me better, and at an expense which (including horsehire) half a guinea a day will not reimburse.' Thomas Plummer, another York attorney, who was also dissatisfied, declared that parsimony of this kind would 'recoil upon the cause itself', discouraging men from assisting in the future, and he went on to maintain that 'the fees of electioneering agents, etc., should not bear an exact ratio to the service or other mode of charging in private business for the employ ceases with the election but their zeal and activity may be long remembered by and give offence to some of their friends who are inimical to the cause and on the other hand any particular attendance in private practice must have a previous or a consequential employ if not both and probably secure a client for ever'. He claimed that he had wholly neglected his own practice for over a month, and had broken an agreement with the city candidates in order to attend more closely to the concerns of those for the county. He thought 60 guineas too small a reward to him in his 'peculiar position as a confidential agent'. Plummer occupied an important position in the running of this election—many of the requests for payment from other agents are addressed to him—and he was obviously concerned that the committee did not put the same value on his services that he did himself, and hinted that they were taking advantage of his known adherence to 'the cause'.

Another correspondent wrote from London: 'I could have wished that 50 guineas instead of 30 guineas had been given to Mr Law, this being a lawyers' harvest, they estimate wages pretty high, but I have seen him and he expressed to me no dissatisfaction at his

¹ Some attorneys felt they could not risk losing clients by being on the wrong side in an election, even to oblige a man like the Earl of Strafford. William Ingram, a Wakefield attorney whose vote and interest Strafford had sought in 1733 replied explaining that they were already promised to Sir Rowland Winn, and which, he added, 'I could not tell how to deny him, since hee is one of my best clyents and I am under great obligations to that family. Besides if I had denyed him I should have disobliged several of his friends who are my best clyents, and truly, my Lord, I cannott live as I do without businesse, wherefore I hope your lordship will pardon me if I cannott oblige your lordship herein; and I hope Sir Rowland will bee for the interest of the country, and never prevailed on to accept of a pension or place...' (Ingram to Strafford, 26 October 1733; Wentworth Papers, p. 485; quoted Collyer, 'The Yorkshire Election of 1734', loc. cit. pp. 60–1).

fee.' Thomas Barstow, an attorney of Leeds, thought that agents should be paid 2 guineas a day, 'myself and two clerks being solely taken up with that business all the time and a great part of the time two of my own horses and frequently a servant employed therein....The other part of the bill', he explained, 'is for money paid for distributing and putting up papers, cards, and circular letters, searches into the Land Tax duplicates, copies and abstracts and remarks thereon, amounting the whole to £3. 7s. 2d.'1

Richard Fenton's successor as agent was Charles Bowns, who was employed in the election of 1807.<sup>2</sup> By then agents' fees had been increased.<sup>3</sup> Mr Hall, a solicitor of Barnsley, who was asked to assist as deputy to the sheriff, was told:

The sheriff's deputies will receive the same compensation per day as the respectable professional men who are engaged on behalf of the candidates in canvassing etc., and we understand this to be at five guineas a day. Should you have been engaged in canvassing for any of the candidates, it will not be urged as an objection to your acting for the sheriff.<sup>4</sup>

Between elections, it was the duty of the local attorney who acted as agent to look after the political interests of his employer. In 1792, on the advice of Charles Bowns, a tenant was evicted from one of Fitzwilliam's farms near Doncaster because he was suspected of belonging to the Constitutional Society at Sheffield.<sup>5</sup> In 1807 William Hastings, the agent at Malton, supplied Fitzwilliam with a list of the tenants who had voted against the family interest, and suggested that they should be evicted. He also reported that among those most active in canvassing for the opposition were four

<sup>&</sup>lt;sup>1</sup> The 1784 election was disastrous for the 'Whigs'; this same agent wrote to Bowns: 'I am sorry the world is so bewitched; Pray God mend them or make new ones, whichever's the less trouble.'

<sup>&</sup>lt;sup>3</sup> James Wheat was concerned in this election on Wilberforce's behalf at Sheffield, and was paid £133 (Wheat Collection, 1236).

<sup>&</sup>lt;sup>8</sup> According to Oldfield this was 'the most expensive election contest that ever distinguished the annals of electioneering'. Polling went on for fifteen days, and the candidates were said to have spent nearly half a million pounds (T. H. B. Oldfield, Representative History (London, 1816), v, 267). See also W. W. Bean, op. cit. 657-9. Professor Gash states that the election cost the Lascelles and Fitzwilliam families over £100,000 each (Essays Presented to Sir Lewis Namier, edd. R. Pares and A. J. P. Taylor (London, 1956), p. 280).

<sup>4</sup> W.W.M. E 178/44.

<sup>&</sup>lt;sup>6</sup> W.W.M. F 71. The tenant was subsequently reinstated. He belonged to the Society for Constitutional Information, not to the Sheffield Society, and even the latter he claimed was more repectable than Fitzwilliam thought.

attorneys, including Daniel Lambert and Edward Leefe, and he suggested that some mark of resentment should be shown them. This was not easy, since both had been employed by Fitzwilliam in the past, and in the recent election, Leefe had been canvassing on behalf of Fitzwilliam's candidate. In the following year, Hastings reported that there was a house for sale in the borough which carried a vote and asked whether he should buy it. He was instructed to do so, but to pay only the real, not the election value of the property, and only if the freeholder whose property adjoined did not want the house.

Matters of this kind were not always arranged as scrupulously as this, though clearly Fitzwilliam felt no great anxiety about his position at Malton. There are many examples of the illegal or barely legal practices adopted by attorneys during elections—arranging fictitious conveyances, splitting burgages, questioning the right of an opponent's supporters to vote, and all the rest. No special blaine need be assigned to the attorneys for this. They were expected to do their best for their employers, and in the tangled undergrowth of the electoral system of the eighteenth century there was ample opportunity for legal quibbling and chicanery.

Details of these practices can be gathered from many of the local political histories and from the Journals of the House of Commons. Many are given by Oldfield who was himself an attorney and was certainly a reformer, anxious to clear away many of the survivals which others of his profession found so profitable. It will be convenient to take some examples from the borough of Horsham, the scope for attorneys' activities being clearer in the boroughs, and Horsham being one which was hotly contested on several occasions. In the election of 1715 John Linfield, an attorney, was found guilty of illegally procuring votes and was ordered by the House to be taken into the custody of the serjeant at arms on 16 June. On 2 July he petitioned for his release, acknowledging his guilt and claiming 'that it being term time, and an issuable term, if his confinement should be continued it may prove very prejudicial as well to the affairs of his clients as his own'. His friends were able to get a

<sup>&</sup>lt;sup>1</sup> He is said to be an attorney in D.N.B. but 'unknown to the Law List'.

<sup>&</sup>lt;sup>2</sup> There is a very detailed account of election matters there in W. Albery, *The Parliamentary History of Horsham* (London, 1927).

<sup>&</sup>lt;sup>3</sup> Albery, op. cit. p. 68.

majority of the House to vote in his favour, and he was released after paying his fees and apologising to the Speaker.

In 1790 another Horsham attorney received a request from Alexander Williams of Chichester to use his influence with Lady Irwin to procure a 'quiet seat' for a friend.¹ Lady Irwin, however, was not in a position to offer anyone a 'quiet seat'. In 1791 she herself wrote to a neighbour Mrs Bridge: 'As I learn that I am again to be attacked by the Duke of Norfolk, I hope you will have the goodness to assist me by conveying over your property to some friend of yours you can trust and who will vote for my friends when the time comes, and I will order my steward to pay your attorney all the expenses attendant thereon.'² Prolonged struggles for political influence like this one between the Duke of Norfolk and Lady Irwin, provided many pickings for attorneys, and as was the case here, were only brought to an end by the sale of the borough, itself likely to be a long business, profitable to lawyers.

The Duke of Norfolk's attorney in this dispute was Thomas Charles Medwin. In 1786 he was appointed steward of the Duke's Court Baron, and in 1787 Norfolk bought out the town clerk and steward of the Court Leet, William White, who was a supporter of Lady Irwin, for £1000, and installed Medwin in his place. Medwin, who already had a considerable practice, was an expert on manorial law and custom, and an appropriate assistant of the Duke's in this strategic position. As steward of the Court Leet he was able to reject the votes of all Norfolk's opponents, and from 1788 the attack on Lady Irwin proceeded. Burgages were bought, faggot votes created, the court and burgess rolls manipulated in the Duke's favour; the burgages were conveyed to Medwin or another agent 'to preserve appearances', and the Sussex Advertiser noted that as a result of the determination of the Duke to oppose Lady Irwin, the prices of houses with votes had 'increased near a thousand per cent in their value'.8 Between 1789 and 1802 the tussle continued, with quo warranto proceedings being instituted against faggot voters on both sides. The defeated candidates in the election of 1790 petitioned against the result, alleging that there had been illegal practices on the part of the bailiffs and the returning officer whom Medwin as steward had appointed, and who in their turn

<sup>&</sup>lt;sup>1</sup> Albery, op. cit. p. 247.

<sup>&</sup>lt;sup>2</sup> Ibid. p. 248.

<sup>&</sup>lt;sup>3</sup> Sussex Advertiser, 8 September 1788; quoted ibid. p. 130.

had appointed Medwin as their poll clerk. In this capacity, Medwin had refused to accept any votes on Lady Irwin's side.

The uncertainty about electoral proceedings at Horsham was shown by the tactics adopted by both sides in 1806. Medwin, acting on the determination of the House of Commons in 1715, adopted the practice of splitting burgage holdings into as many parts as possible. The other side, acting on the basis of the act of 1606 which held that the right to vote depended on the possession of a whole burgage, adopted the method of piecing split parts together. When the election came on the bailiffs held that the matter was one in which they could use their discretion, whereupon Lady Irwin's agent declared: 'Then it will be my duty to go and get a wheelbarrow full of new conveyances.'1 Naturally, in these circumstances, the Duke's candidate was again successful. Lady Irwin's agents objected, and the bailiffs, remembering the penalties which had been imposed for a false return in 1790, made a double return and left the issue to be decided by the House of Commons. After the election which followed the fall of the All Talents Ministry, the bailiffs refused to make a double return, declared the Duke's candidates elected, but had their decision reversed in the House. In 1808 the Duke's candidates were again successful at the polls, and were again unseated on the petition, and it was not until he had bought the borough from Lady Irwin's heir for £91,475, that the Duke was successful in getting his candidates into parliament, and keeping them there.

There were as many examples of attorneys acting in these ways as there were attorneys acting as political agents, men like John Butcher, the Duke of Rutland's agent at Cambridge,<sup>2</sup> and John Robinson himself, who began life as an attorney, became Lowther's attorney and agent, and, after many years as Secretary, to the Treasury under Lord North, ended his career in charge of the preliminary organisation of the election of 1784.<sup>3</sup> These are examples of the more famous of the political managers and agents, whose successors in the nineteenth century, in a field of electoral management rendered perhaps more fertile by the Reform Act and the

<sup>&</sup>lt;sup>1</sup> Albery, op. cit. p. 200.

<sup>&</sup>lt;sup>3</sup> See H.M.C. Rutland MSS. III.

<sup>&</sup>lt;sup>2</sup> Robinson had been articled to Richard Wordsworth, William's grandfather; he was town clerk, and subsequently mayor, of Appleby. There is a short account of Robinson's career in I. R. Christie, *The End of North's Ministry*, 1780-82 (London, 1958), pp. 32-3.

Voters' Register, were men like Joseph Parkes in Birmingham and John Coppock.<sup>1</sup> But there was a multitude of lesser men, the local attorneys all over the country, who found in these transactions a 'lawyers' harvest' indeed.

There is another aspect of political life from which the attorneys could profit. This was the business of soliciting private bills in parliament. Because of enclosures, turnpikes, canals, and many other matters of this kind, there was a very large number of such acts in the Commons in the second half of the century, and there was much competition among local attorneys to do this work. This, too, was an employment that was eventually taken over by specialised parliamentary agents, but in the meantime it was done by the country attorneys, often with the help of their London agents, some of whom were coming to specialise in work of this kind.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> In 1844 James Heywood wrote to the president of the Anti-Corn Law League: 'In the warfare of the registration the solicitors rise to the rank of Generals, and the policy of the government of the country greatly depends on their talents and energy in the right formation of the constituencies on the register.' I owe this reference to Dr Norman McCord. There are many examples of such men in Trollope's novels; see also Norman Gash, *Politics in the Age of Peel* (Oxford, 1953).

<sup>&</sup>lt;sup>3</sup> O. C. Williams, *The Clerical Organisation of the House of Commons* (Oxford, 1954), p. 186. For the dispute between the Society of Gentlemen Practisers and the clerks of the House who claimed a monopoly of certain types of parliamentary agency, see p. 26 above.

### CHAPTER VIII

# ADMINISTRATION AND FINANCE

In their concern with estates and elections, the attorneys were only agents, filling—perhaps exploiting—situations which they had not created. The same was true of their work in the administration of local government. Much of the burden of government was placed on the shoulders of lords lieutenant and the justices of the peace in the counties, and of the varied courts and corporations in the towns and boroughs. It was passed on by them to their assistants and subordinate officers, the clerks of the peace, town clerks, clerks to corporations, stewards of manors and the like. It was these posts that were habitually filled by attorneys, and which provided yet another way in which they could enhance their position and add to their influence in eighteenth-century society.

Local government in the period before 1835 was studied by the Webbs, and from their work some idea can be obtained of the part which attorneys played in it. In the first place they held the office of clerk of the peace, or performed its duties as a deputy for some protégé of the lord lieutenant. In Cumberland, for example, in the last decades of the century, the clerk of the peace was J. B. Garforth, Lord Lonsdale's agent and attorney, and one of his members of parliament. Garforth practised in London, lived in Yorkshire, and spent only part of the recess in Cumberland. The routine business of the office was carried on by another attorney, Joseph Hodgson of Carlisle, who had to report regularly to Garforth about county business, and go up to London whenever occasion demanded.

Hodgson was succeeded by his brother William, who became clerk of the peace, the first of his family to hold an office they were to monopolise until the twentieth century. This seems to have been a common situation. The Webbs noted it, and remarked: 'We find in practice the post of Deputy Clerk of the Peace held, almost as a hereditary possession, by the principal firm of solicitors in the county town, one of the partners of which personally attended the justices' meetings, drafted their formal resolutions, and advised them in matters of law, but left all the work to his clerks. Under these circumstances it was with the utinost difficulty that he or his clerks

could be got to perform any official duty out of which they could extract no fee from some person or other. Everything beyond the crowded business of Quarter Sessions, the orders desired by private suitors, and those absolutely required by law tended to be neglected.'1

These are the opinions of reformers, judging the eighteenth century by standards appropriate to the twentieth. There may have been a tendency to neglect business which was unlikely to be profitable for that which brought in handsome fees, but these offices were mainly paid by fees. It is perhaps surprising that so many officials of this kind were able to keep up an extensive private practice at the same time as they coped with the growing number of administrative duties, but Hodgson's correspondence at least does not suggest that these duties were always neglected.

It would have been more surprising if they had been, for so long as the lord lieutenant continued to be a friend of the existing government, it seems unlikely that any negligence on the part of the clerk of the peace would long be tolerated. The bonds which held society together in the eighteenth century were different from what they were later to become, and perhaps they meant that a system which would certainly have broken down in 1900, could still function with some success in 1800. This is not to say that the system was completely efficient. It was not, and its deficiencies were beginning to be noticed. But it bore the burdens of wartime administration, in a period when the central government was unusually concerned about what went on in the localities, and was impinging ever more closely upon them.

Of course patriotic zeal may have operated to ensure that the system worked more smoothly than it would have done normally. In December 1795, for example, Garforth wrote to Hodgson:

I was yesterday told that a requisition was intended to be made to the Sheriff to call a county meeting to hear petitions against the two bills for the preservation of his Majesty and to prevent seditious meetings—I hope the sheriff will have prudence enough not to do it, but if otherwise, that the friends of the constitution will not only put a negative thereto but will make a Declaration similar to the Declaration of the Merchants etc., at the County Meeting on Tuesday last at York.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> S. and B. Webb, English Local Government: The Parish and the County (London, 1906), p. 504. For a succession in office such as that the Webbs complained of, see Wiltshire Quarter Sessions and Assizes, 1736 (ed. J. P. M. Fowle 1955, Witshire Archaeological and Natural History Society, Records Branch, vol. XI).

<sup>&</sup>lt;sup>3</sup> Hodgson MSS. File A, bdle 3; Garforth to Hodgson, 5 December 1795.

Fear of Napoleon may have caused an unusually large proportion of the people to rally to the support of the government and the constitution, but even in quieter times, those who owed their positions to their avowed friendship to the existing administration would not be over-hasty in putting those positions in jeopardy by neglecting to carry out the wishes of the government.

In the absence of more specific organisations of local government, a great deal of the legislation passed to cope with the conditions at the end of the century had to be put into effect in the localities by the magistrates and county officials. In January 1793 one of the Cumberland justices wrote to Hodgson, asking him to order several volumes of statutes needed to complete the series, and he added: 'as a few years last past has made a wonderful addition to the laws respecting magistrates and the sessions business, I think it will be proper to order the last edition of Burn down with the statutes.'

What all this 'wonderful addition' implied in the case of Joseph Hodgson can be briefly indicated from his correspondence. The Overseers of Rockliffe were fined for not making a return of those who were fit to serve in the forces; the Duke of Portland wrote for the names of the officers of the Militia in order to insert them in the London Gazette; the Lord Lieutenant wanted lists from the constables of all men between the ages of 55 and 60, and of wagons, carts, etc.; arrangements had to be made for the release of prisoners on condition of joining the army or navy abroad; meetings of the justices were held to raise men for the navy; there were riots at Brampton to be dealt with; Portland wrote again for a list of all the friendly societies in the county. New acts such as the Hair Powder Act imposed fresh duties on the clerk; men objected to having to find a cavalryman and a horse, and complained that their incomes had been overestimated; James Graham of Netherby was unable to accept the offer to recommend him to the Lord Lieutenant as commander of the Volunteer Troop at Carlisle; Portland wrote again in 1803 about finding men to serve in the navy, and in the same year the proclamation against aliens had to be published throughout the county.

<sup>&</sup>lt;sup>1</sup> Hodgson MSS. File L, bdle 22; J. C. Satterthwaite to Hodgson, 23 January 1793. The extent of this 'wonderful addition' is shown visually by the increase in the size of Burn's *Justice of the Peace*. The first edition was contained in two volumes: the nineteenth edition, published in 1800, was in four volumes, each of which contained on the average more than 800 pages.

These were some of the duties which were the result of the war. In addition to these, the normal sessions business went on. The county was indicted for not repairing Blennerhasset Bridge, and Hodgson had to go up to London on the matter. Garforth had to be kept informed of all county business, and routine matters about land tax duplicates, sessions precepts, jury lists, had all to be communicated to him. Hodgson kept him informed about politics in Carlisle and the county, and took up the necessary details to London when there was a petition against the election return, as in 1796.

In 1792 the Society against Vice and Immorality sent an account of how the prisoners in Dorset Gaol were employed, and asked Hodgson to distribute copies to the magistrates. In 1794 the Board of Agriculture asked him to circulate a questionnaire about cropping to the more intelligent farmers in the area. The secretary of the Society for Bettering the Condition of the Poor wrote about visitors for cotton and woollen mills. The Lord Chancellor wanted lists of all persons discharged under the insolvent debtors act. There was the regular business with game certificates, ale house recognisances, hair powder certificates, reports from the Grand Jury about the state of the county gaol, and all the day to day matters of appeals, settlements, roads, bridges, and the like.

Added to this was Hodgson's private practice, his agency for the Paisley Bank, and local business for Lord Lonsdale. Towards the end of the century Hodgson was joined in Carlisle by his brother, William, who eventually succeeded to his practice and his offices. As clerks of the peace, some functions were denied them: they could not, for example, practise in the county courts, but they could

<sup>1</sup> The following lines from the *Ladies' Magazine* for 15 December 1750 describe the business of a country quarter sessions:

'Three or four Parsons, three or four Squires,
Three or four Lawyers, three or four Lyars,
Three or four Parishes bringing Appeals,
Three or four Hands, three or four Seals,
Three or four Bastards, three or four Whores,
Tag, Rag, and Bobtail, three or four Scores;
Three or four Bulls, three or four Cows,
Three or four Orders, three or four Bows,
Three or four Statutes not understood,
Three or four Paupers praying for Food,
Three or four Roads that never were mended,
Three or four Scolds,—and the Sessions is ended'

(quoted in L. J. Redstone and F. W. Steer, Local Records, their nature and care (London, 1953), p. 120).

carry on the business right up to the appearance in court, and then, if necessary, get a partner or another attorney to do the court work. Here again the Webbs take the profession to task. They quote the opinion of James Bland Burges, M.P., who considered that the county court was 'an engine of the most nefarious oppression' leading frequently to the 'necessary ruin' of one or both litigants,¹ and, they continue, 'the profit of rapacious attornies, in collusion with one of their number acting as Undersheriff, aided by venal jurymen serving for the shilling fee. The cases cited appear to support this indictment. But Burges became a permanent civil servant, and dropped the Bill he had contemplated.' The fees of the clerk of the peace were limited by an act of 1755,² but the office continued to be sought after, for apart from the fees and the salary, the position brought in much profitable legal business of which the clerk had the first picking.³

Since the administration of justice and of local government was so largely left in the hands of amateurs, they had to rely very heavily on the professional advice of lawyers, clerks of the peace and undersheriffs. And since the justices were not uniformly upright and public-spirited, there were many complaints both of their negligence and of the deceits which they practised. As one critic pointed out, 'the ignorant magistrate...not infrequently degenerated into a passive and mischievous instrument in the hands of a rapacious attorney or some other discarded underling of the law'. In the case of the trading justice, intent only on his own profit, this might develop into a formidable conspiracy between justice and clerk. Certainly this was the opinion of many observers. But if there were

2 26 Geo. II, c. 14.

<sup>4</sup> Thomas Gisborne, Enquiry into the Duties of Man (1794), p. 288; quoted Webb, op. cit. p. 349, n. 5.

<sup>&</sup>lt;sup>1</sup> J. B. Burges, An Address to the Country Gentlemen of England and Wales (1789), quoted Webb, op. cit. p. 290, n. 2.

<sup>&</sup>lt;sup>3</sup> Struggles between attorneys for offices of this sort were not new in the eighteenth century. Cf. J. J. Bagley, 'Kenyon v. Rigby: The Struggle for the Clerkship of the Peace in Lancashire in the seventeenth century', *Transactions of the Historic Society of Lancashire and Cheshire*, vol. 106, 1954 (Liverpool, 1955).

There are many instances in the works of Fielding; see, for example, *The Justice Caught in his own Trap* (1730). The trading justice is described in a farce quoted by the Webbs as 'An old fellow, qualified with ill nature and avarice, by the help of a little money and some interest, gets into the commission. He entertains a clerk, some broken attorney (for they make the best clerks)...and for their honesty they are generally on a par. The fees are divided into four parts; the justice has two, the clerk one, and the favourite constable the other' (*The Perjuror* (1717); quoted *ibid.* p. 329, n. 1).

attorneys ready and willing to indicate to their employers ways of getting round the law, there were others who, again inspired by motives of gain, might keep a very close watch on the activities of those whom they disliked.<sup>1</sup>

The increasing importance of special sessions and the growth of petty sessions which the Webbs noted meant that some local attorney would be recognised as the clerk for all these occasions by all the neighbouring justices, and his office would become the clearing house for all problems to be heard by them, 'The justices' clerk, attending or residing at the private house of the country gentleman, in this way gradually ceased to exist. When any person importuned a magistrate at his private house on any business requiring a warrant or other instrument, he was generally referred to the office of the attorney in the market town, who took the fee, and prepared the necessary document to be signed by the magistrate when he rode in to attend the divisional sessions.'2 In this way, the office of the clerk became almost the headquarters of local and county administration, and what were in fact official papers have thus been submitted to the fate of private property, so that records of these activities survive in many cases only by chance.

A similar situation existed in the boroughs, in which the attorneys perhaps stood out more clearly as a sort of urban élite.<sup>3</sup> Their political activities have already been described, but there were other sources of profit, legitimate and otherwise, many of which were revealed by the municipal corporations commissioners in 1833. Their standards in dealing with corporation property were no higher than those of the corporations themselves, and John Butcher, who profited greatly from his post as attorney to the corporation of

1 'When a Justice of the Peace, inspired with a true public spirit, meets with inferior officers of courage and intrepidity, and sets about a reformation of the unlicensed houses, he finds himself surrounded with numbers of pettifogging attorneys and solicitors, who watch his steps, and if there happens the least flaw in the method of drawing up and managing the proceedings, he finds himself obliged to attend a certiorari in the King's Bench' (Distilled Liquors the Bane of the Nation (1736); quoted Webb, op. cit. p. 336).

The importance of attorneys' families in one borough is very clearly indicated in H. S. Toy, *The History of Helston* (Oxford, 1936). Shelburne thought that the benefits which owners could derive from boroughs were exaggerated. The demands on them for subscriptions, etc., were heavy: 'add to this livings, favours of all sorts from government, and stewardships, if there is an intriguing attorney in the town, who under the name of your agent will deprive you of all manner of free agency upon your own property, and sometimes of the property itself, if it is a small one' (quoted Fitzmaurice, *Life of Shelburne* (2nd ed. London, 1912), II, 357).

Cambridge, cannot have been unique.¹ More legitimate were the profits they gained from holding such offices as town clerk, as well as various others in the borough courts. At Oxford there were three places in the city government which were habitually filled by attorneys, those of town clerk, city solicitor, and coroner, in descending order of importance, and which seem frequently to have been held in succession.² The fees obtained from suitors in the city courts seem generally to have been declining and at both Oxford and Cambridge there were complaints that the courts were being neglected by the more respectable attorneys in the town.

There were many other capacities of a semi-official nature in which attorneys could act. They played an important part on all the various committees which were an increasingly common feature of urban life. They were often collectors of the stainp duties which were charged on apprenticeship indentures.3 Occasionally they appear in the lists of those who administered the land tax, although there was a certain prejudice against employing them in this—as in other capacities—lest, getting too close a knowledge of other people's affairs, they should be tempted to 'set them by the ears'.4 They were, however, usually clerks to the commissioners in the localities. Occasionally also they were receivers of the income tax, such as Christopher Pemberton, receiver-general for Cambridgeshire. He had succeeded his father as receiver-general of the assessed taxes, was clerk of the peace for the county, and colonel of the Cambridgeshire Militia.<sup>5</sup> Attorneys almost always acted as clerks to the boards of general commissioners of the income tax.6

<sup>1</sup> Cf. Digested Report of the Evidence taken before the Corporation Commissioners at Cambridge (1833), p. 44. See also the articles by Helen Cam, 'Quo Warranto Proceedings at Cambridge, 1780–90', Cambridge Historical Journal, VIII (1946); 'John Mortlock III', Cambridge Antiquarian Society Proceedings, XL (1944).

Surrey Record Society, XXVIII (1924), 'Surrey Apprenticeships', Introduc-

tion, p. xxiv.

<sup>4</sup> W. R. Ward, The English Land Tax in the Eighteenth Century (Oxford, 1953), pp. 88 and 159. By 22 Geo. II, c. 2, no attorney was to act as a commissioner for the land tax unless he possessed property to the value of £100 per annum.

<sup>&</sup>lt;sup>2</sup> Cf. Oxford Council Acts, 1701-52, ed. M. G. Hobson (Oxford, 1954), passim; and the account of the town clerkships of the Heyricks, father and son, and of William Burbidge, in Leicester, in A. T. Patterson, Radical Leicester (Leicester, 1954). See also R. W. Greaves, The Corporation of Leicester (Oxford, 1939).

<sup>&</sup>lt;sup>5</sup> A. Hope-Jones, *Income Tax in the Napoleonic Wars* (Cambridge, 1939), pp. 51-2. On a number of occasions Pemberton was also clerk to enclosure commissioners in the county. (L. S. Pressnell *Country Banking in the Industrial Revolution*, p. 353, n. 1; see also *ibid.* pp. 61-2).

<sup>6</sup> Hope-Jones, op. cit. p. 63.

There were many other semi-official positions commonly filled by attorneys. The great number of enclosure acts,1 the turnpike trusts, the companies of canal builders, and of industrial enterprises of all kinds—all these bodies had greater or lesser amounts of secretarial and legal work to be done, and in most cases the attorneys were the only persons available with the necessary qualifications.<sup>2</sup> Acting as clerk to one of these bodies, the attorney would only be given a nominal salary, but he was given a monopoly of the legal work to be done, and in the case of an enclosure act, for example, this might be a great deal. These were considered desirable jobs, and there was much competition for them. In the case of clerkships to guilds, schools, charities, and the like, the position was often filled by successive members of the same firm, or it was taken over with the practice when it changed hands, but in such matters as enclosures there was often much dispute among attorneys representing the different landowners concerned about soliciting the necessary bill in parliament.3

Once again, in the case of country banking and in financial transactions of many kinds, the attorneys in the eighteenth century are found filling the places which were later to be occupied by men exclusively concerned with these matters. They were in an

<sup>1</sup> Attorneys formed a good proportion of enclosure commissioners; cf. W. E. Tate, 'Oxford Enclosure Commissioners, 1737-1856', Journal of Modern History, XXIII (1951), p. 145. Between 1760 and 1800 1479 enclosure acts were passed; cf. W. G. Hoskins, The Making of the English Landscape (London, 1955), p. 143. Such acts were a source of much profit to lawyers, and they naturally opposed the passing of a general enclosure act. Lord Ernle, English Farming Past and Present, 4th ed. (London, 1927), p. 251.

<sup>8</sup> In only one year, 33 Geo. III, some 114 local acts were passed, principally concerned with roads, canals, and enclosures (*Chronological Table of the Statutes*, 1955).

In 1805 the Registraryship of the Bedford Level fell vacant, and the post was disputed between Edward Christian, Downing Professor, and William Saffery, an attorney of Downham, in Norfolk. Each of them claimed the majority of the votes, but Christian took possession of the Fen Office in the Temple, where the records were kept, and barricaded the doors and windows. Saffery, however, got into the office in the absence of the clerks, and when Christian returned he was refused admission. On the following day Christian asked permission to take away some private papers from the office. This was granted, but Saffery's clerks, suspecting a trick, opened the door cautiously, saw three men behind Christian, closed the door again hurriedly so that Christian was only able to get his hat inside. Saffery refused to return the hat, and kept it as a trophy. Christian claimed that the chief justice of King's Bench held him to be in the right, but when he applied to court, judgment was given in Saffery's favour (Henry Gunning, Reminiscences of Cambridge (2nd ed. 1855), 1, 194-5). I owe this reference to Mr John Saltmarsh.

advantageous position for undertaking work of this kind. As the confidential advisers to men of property it was part of their business as attorneys to be acquainted with the financial world. They were in contact with those who either had money to lend, or who wanted to borrow, and in many normal occasions of their practice as attorneys—in connection with marriage settlements, the making of wills—they were liable to have money left with them to dispose of, or to be asked to find those willing to lend and to take up mortgages. With their unrivalled professional knowledge of local society, the attorneys were the most obvious men to resort to for help in matters of this kind. Some of these functions were to remain characteristic concerns of the profession, but by the end of the eighteenth century, the development of a more intricate and complete banking system meant that much of this work was performed by others who were not attorneys.

For these reasons, attorneys are found to be one of the main groups of those involved in the foundation of country banks. Along with industrialists and those responsible for the collection of taxes and duties of all kinds, they were most suitably situated to assist in this development and specialisation. Because of their convenient situations and their wide professional connections, they were also employed as agents by banks which were already established. But above all else, they appear to have filled an extremely important place in the financial life of the country in the business of arranging loans and mortgages. This is an aspect of the business of the attorney in the eighteenth century which is confirmed by all the professional papers which have been examined.

The part played by attorneys in founding country banks has recently been shown by Dr Pressnell, and will not be dealt with here.¹ But the activities of Joseph Hodgson as agent to the Paisley Bank in Carlisle may be described in some detail, for he was a salaried agent only, not a partner in the bank. It is not clear when his connection with the Paisley Bank began, but by December 1790, he was sufficiently well established to be consulted, rather in the capacity of the head agent of the bank in the area, about the character of a man seeking the post as agent in Penrith. His function was to circulate the notes of the bank as widely as possible. The bills bought by him were sent to the London agents of the Paisley Bank, Messrs Smith, Payne and Smith; an account of these was

<sup>&</sup>lt;sup>1</sup> L. S. Pressnell, Country Banking in the Industrial Revolution, pp. 36-44.

sent to Paisley, and the sums placed to Hodgson's credit there. The usual method of sending the notes to Carlisle was by the carriers' cart which travelled between Carlisle and Glasgow, a method not without its hazards from weather and from the rivalries between the two firms of carriers which operated on that route. In winter months when the carts could not get through, notes were remitted by the post, but as only £150 could be sent under one frank, this was not a satisfactory method.

Hodgson's salary was paid every six months. In 1792 he was paid £100 together with travelling and other incidental expenses, and in the following year his salary was raised to £105. Naturally the bank was anxious that its agents should not use the company's money for their own purposes. In 1792 Hodgson was asked about the activities of the agent at Penrith, which had aroused the suspicion of Hog, the manager of the bank with whom Hodgson corresponded. In 1794 doubts were apparently felt about Hodgson himself: certainly Hodgson had the impression that the bank suspected him of dishonest dealings. On 13 April 1794 Hog wrote to assure him that there was no ground for suspecting him, and told him: 'I know full well that you are above such a thing.' The following day Hog wrote at greater length to explain the letter which had caused Hodgson this uneasiness, but he added:

Allow me to add that I did think some of your customers were making forced transactions to support their credit which is a losing game to us and dangerous to you, and I still think the way some of the notes returned had that appearance....I thank you for the communications as to your private fortune which were quite unnecessary to mention—it is indeed very handsome and much may it increase....I am obliged to you for the benefit you mention we have derived from your own money but we had no expectation of such a thing, nor wished for it.<sup>1</sup>

These suspicions seem not to have been entirely allayed, for in October Hodgson wrote again on this point, and claimed,

I can with confidence assert that no agent ever made it his study more to advance the interests of his employers than I have done in regard to the agency I have transacted for you which I am convinced every banker in Carlisle well knows, and as to money I can only inform you I have upwards of two months had from seven to £900 by me belonging to my clients and which I was liable to be asked for at a moment's notice. Therefore I made no use whatever, except permitting you to have the interest of it.

<sup>&</sup>lt;sup>1</sup> Hog to Hodgson, 14 April 1794; Hodgson MSS. File C, bdle 7.

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As to the mode of issuing your notes it has not in the least degree altered except for the better at Carlisle-I have always since I began given your notes to persons going to buy cattle in Scotland with which no fault was found till lately and how the circulation is altered in that respect I cannot say, tho' I can say it is the worst we have.... As to your suggestion of paying value for part of the notes issued here I cannot say how I can answer that further than my opinion that it is very improbable: to be sure a case may arise of that kind, but I hope it is seldom....When I give your notes for English those I receive I lay by me till the Monday or Tuesday following whatever day I may receive them....As to my receiving any emolument either directly or indirectly from your money I can assure you no such thing exists. I am not like a person in trade for it seldom happens I lay out more than f to at a time and that very seldom-indeed my income is and has been such for years back that I might have lived, had I thought proper, in a very different style. My office of clerk of the peace alone produces more than £200 exclusive of my professional practice....You may therefore easily form an idea of my situation but if you still have any idea of my using your money I hope you will have the candour to say so at once, and I will as soon as possible settle all accounts between us. The idea of being suspected I hatewhen I first saw your letters I made up the balance of cash in my hands.1

Here the letter breaks off, but the connection appears to have continued for some time, and was kept up by William Hodgson when he succeeded to his brother's practice.

The Paisley Bank and the Paisley Union Bank were rivals, and both had agents in Carlisle. Each was concerned that the other's agent should be prevented from poaching on what they considered to be their special preserves, though they were not above encouraging their agents to do this if it could be done with impunity. These activities caused some bitterness at Paisley, but so long as each found them profitable, they were not likely to stop.<sup>2</sup>

The bank kept a very close watch on Hodgson's activities, even to the extent of pointing out a discrepancy of eightpence. From time to time Hog wrote long and intricate letters advising him on the method of circulation to adopt, and on the course he was to adopt at critical times such as that of the crisis in 1793. The bank partners were not entirely satisfied with the way Hodgson's notes circulated, as has been shown, but he seems to have been held in some esteem. He was often asked for his advice about extending

<sup>&</sup>lt;sup>1</sup> Hodgson to Hog, 10 October 1794; Hodgson MSS. Paisley Letter Book.

<sup>&</sup>lt;sup>3</sup> Cf. the letters from Hog of 24 March and 18 May 1792; Hodgson MSS. File C, bdle 7.

the business of the bank by appointing agents in other towns in the border counties, a matter in which his professional connections were of some help. The bank was prepared to allow him to undertake all aspects of banking business, provided that he fitted up an office solely for this purpose, and they sent a clerk from Paisley to help him with this. Like all eighteenth-century business correspondence, this one contains references to many other matters. Hodgson supplied Hog with salmon, and on one occasion sent him a greyhound. Hog in his turn suggested that there might be money to be made in exporting coals from Cumberland to Dublin in 1792, and advised Hodgson about the possibility of setting up a cotton manufactory in 1793.

Most attorneys had no such direct connection with the banking world, but all of them seem to have played an important part in transacting financial business. The negotiation of loans was a major part of their business, and in most cases the money they dealt with was that of their clients, but occasionally they put out their own. William Adams, a Sheffield attorney at the beginning of the century, seems to have lent his own money to clients, in sums of £60 and £100, and also in sums of £2 or £3. Most of the money he handled, however, belonged to others.

Samuel Dawson, another Sheffield attorney, had a more extensive business of this kind. In his case the sums involved were much larger. John Bright wrote in April 1747 for a further loan of £1000.<sup>2</sup> Another client, Thomas Hinckesman, wrote in August 1754 thanking Dawson for his offer to put out £500 for his mother.<sup>3</sup> In 1765 Dawson was asked to procure £2000 for William Howley on the security of land worth £3000.

I have it in my power to make the security better, perhaps as good again, but I hope there is no need of it. The gentleman need not fear the sum increasing by an accumulation of interest, as I will sooner lose my head than forfeit the Equity of Redemption. Of my lands I may

<sup>1</sup> Diary and Account Book of William Adams, MS. Sheffield City Libraries. Joseph Hunter, *Hallamshire* (ed. Alfred Gatty, London, 1869), p. 432 n. 1, quotes the following lines about Adams by Henry Parke, curate of Wentworth:

'Adams the wealthy, good, and mild, He builds his house and tills his field; But amongst all attornies he A miracle is sure to be Who follows law with honesty.'

<sup>&</sup>lt;sup>2</sup> T[ibbitts] C[ollection], 522/16, 30 April 1747.

<sup>&</sup>lt;sup>8</sup> T.C. 522/99, 19 August 1754.

perhaps sell some for which reason I shall not engage them. Before the matter goes much further, I must beg to know who the lender is. I should not care to come into the hands of a money scrivener that lets out his own money in others' names, and twice a year renews the securities....<sup>1</sup>

The lender was not a money scrivener, but a Lieutenant-Colonel of the Queen's Dragoons of Mansfield, 'of as good a temper and as much integrity as any gentlemen in the country; he is now retired and out of the army, and proposes to live upon the income of what he has, and if his interests be duly paid will have no thought of calling in his money....'<sup>2</sup>

This loan was negotiated by Dawson through Charles Bellamy of Mansfield. Dawson seems to have been widely known as an agent in these matters, and in December 1768, another attorney, Jonathan Dawson, wrote to him: 'I have at present 5 or £600, shall have £900 or £1000 in a month or thereabouts. Also £2000 the 1st May and £2000 the 12th May next but would wish to have the two latter sums go in three securities of £1000, £1000, and £2000 or thereabouts. If these or any of them suit or are likely to suit, I shall be glad to hear from you and to divide the profits as usual. Also several sums of £100 and £200 at present.'3 Dawson was still conducting business with this correspondent in 1772, when he told him: 'Within a fortnight past I have lent £1000 at £4-10 and £2500 at £4-5 on as good security as is in Yorkshire, and it is with difficulty now to be procured at £4-10 which is the interest expected for this money.'4

Dawson was in business at least until 1776.<sup>5</sup> He had an extensive practice. He had been articled to John Battie whose daughter he had married. Some indication of one side of his business, the problems it involved, and the kind of person it meant dealing with, is given in this correspondence. In this, as in other branches of the attorney's work, it is very clear that the slightest suspicion of improper behaviour would have a disastrous effect on a man's practice. When so much depended on a reputation for honest dealing and a respectable connection, the anxiety of the attorneys to be thought respectable is very understandable, as also is their indignation at the undiscriminating abuse to which they were sometimes subjected.

<sup>&</sup>lt;sup>1</sup> T.C. 522/246, 27 September 1765.

<sup>\*</sup> T.C. 522/270, 7 December 1768.

<sup>&</sup>lt;sup>5</sup> He died in 1777.

<sup>&</sup>lt;sup>a</sup> T.C. 522/247, 4 October 1765.

<sup>&</sup>lt;sup>4</sup> T.C. 522/319, 13 July 1772.

Certainly the position had its temptations. Benjamin Rogers noted in his diary on 26 June 1733,

I heard a month or more ago that Mr Thomas Binkley, attorney at law of Eynsbury, was gone off 4 or £5000 in debt. He was a man of good credit in his profession, by which means he had the putting out a great deal of other people's money, and it is said he has carried with him most if not all of the above mentioned sum and I now hear he is gone beyond the sea. Cave cui credas.<sup>1</sup>

Many of the critics of the profession noted less respectable financial dealings among attorneys than those of Samuel Dawson. Robert Holloway's strictures are highly coloured, but they are perhaps merely exaggerated statements of real practices. He censured the custom

where attorneys make a trade of discounting small bills of ten or twenty pounds, that do not hold out a probability of prompt payment, for a bill upon the house of Child or Drummond would not answer their purpose; four times out of five the bill is not paid when due, which does answer their purpose. The next morning process is sued out, and £15 or £16 costs in proportion to the number of endorsers, either real or fictitious, is added to the debt of a less sum: this lays the foundation of judgments upon judgments, and a vast accumulation of costs, the dreadful proceedings we reprobate. And we know several instances where an attorney has contrived to make £100 cost upon a debt of £10 within twelve months.

Let any man read the daily papers, and notice the great number of advertisements offering sums of money upon notes, bills, or other securities of respectable tradesmen; who are these reptilized sprigs of Croesus? the diabolical jackals of more diabolical attorneys.<sup>2</sup>

He adds, 'We know of an attorney who, in 18 months sued out ninety tailable actions, all grounded upon small bills, that came into his hands from similar means; this is what they call made business, and, to say the truth, much is made of it.' Financial transactions of this sort were clearly not beneficial to the community, and there was another which Holloway also censured, which was that he ascribed to Mr Gregory Bateman, whose 'parents kept a second-hand clothes shop at the end of Monmouth Street. At a very early age he was admitted an attorney; and, without fortune, family

<sup>&</sup>lt;sup>1</sup> Diary of Benjamin Rogers, Bedfordshire Historical Records Society, XXX (1950).

<sup>&</sup>lt;sup>1</sup> Robert Holloway, Strictures on the Characters of the most prominent practising Attornies (1805-11), p. 88.

<sup>&</sup>lt;sup>8</sup> *Ibid.* p. 89.

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connexions, or a capacity above mediocrity, he soon acquired some monied connexions, which gradually increased, until he found himself able to command vast sums, and become, as it were, banker to most of the distressed men of fashion in town. His house was the *depot* of title-deeds, and other permanent securities, upon the credit of which he procured pecuniary accommodations to an immense amount, and his notes passed with a currency and credit almost equal to the national bank—insomuch, that it became a proverbial saying—"Guineas at BATEMAN'S at two pence a bushel".'1

<sup>1</sup> Robert Holloway, op. cit., p. 67.

#### CHAPTER IX

# TWO ATTORNEYS

#### I. CHRISTOPHER WALLIS

THE Journal of Christopher Wallis, attorney of Helston in Cornwall, gives a vivid picture of the life of an attorney in the period 1790-1815. Wallis was the eldest son of a schoolmaster. He had been articled to William Sandys, a member of a prominent family of attorneys in Helston,3 and was admitted to the Roll in 1769. His Journal is extremely detailed, and must have been a labour of several hours every week. All the work he did is recorded meticulously, together with long and interesting accounts of the state of the tin and copper mines and of agriculture in Cornwall during these years. At the beginning of each volume there is a survey of the main events of his year, and at the end there is usually a passage in which he reflects on events in Europe in this crowded period, and he has much to say about that 'frantic, eccentric, clever fellow, Napoleon'. There are occasional gaps in the Journal—he did not always record his business journeys to London—but for the most part it is very full, and when it is not, there is usually an entry in which he rebukes himself for his failure, and resolves to be more painstaking in the future. And, in addition to this account of a large and varied practice, there are many passages which reveal Wallis's attitude to his calling, and show him to have been eminently, and self-consciously, respectable, the very type of that élite of attorneys which was more and more deciding the character of the profession at the end of the century.

Wallis's assiduity in compiling his journal is a reflection of the attention he devoted to his work. He rose very early—at 5, 4, even 3 o'clock, and after dealing with some correspondence at his home in Trevarno, went in to his office at Helston, and stayed there until 9 or 10 o'clock at night. On Sundays and holidays the pace

<sup>&</sup>lt;sup>1</sup> This Journal, only portions of which survive for the period 1790–1815, is preserved in the library of the Royal Institution of Cornwall at Truro.

<sup>&</sup>lt;sup>8</sup> Nicholas Wallis, master of the endowed school at Madron. See H. S. Toy, *The History of Helston* (Oxford, 1936), p. 301.

<sup>&</sup>lt;sup>8</sup> See Toy, op. cit., esp. pp. 601-2.

<sup>4</sup> In August 1810 he copied into his Journal an extract from the Cornish Gazette which calculated that 'The difference between rising every morning at

was only slackened, not halted. Indeed, such is the impression of unremitting labour that the Journal leaves, that it is hardly surprising to find him writing on 28 October 1792:

Owing to very attentive business, and by too much for one person to manage, I had greatly impaired my intellects and memory, and carried on business rather irregularly, so that no perfect Journals or accounts have been kept by me for near three years last past, but by retiring to Trevarno using exercise and quiet, I am restored, but now find the want of regularity, and I shall be a considerable loser thereby, however to make amends, I have determined to be minutely regular from this time, and with patience all will get right again.<sup>1</sup>

Wallis had an extensive practice in Helston and the surrounding country, together with much business that took him further afield to Exeter, Bodmin, Truro, Falmouth, Launceston, and Penryn, and occasionally for weeks at a time to London. There was the usual business of wills, mortgages,<sup>2</sup> bankruptcies, leases, insurances, parish affairs; cases in the Archdeacon's Court, the Admiralty Court, the Stannary Court. He did much conveyancing, and was steward for the Cornish estates of Lord Arundell.<sup>3</sup>

He was deeply interested both as owner and as lawyer in the copper and tin mines, and was involved in the disputes about patent rights between Boulton and Watt and the Cornishmen. He was attorney for Edward Bull, one of the principal antagonists in this long-drawn-out conflict, and gave much of his time to this matter from November 1792, when Bull asked him to undertake his defence along with two other attorneys, Messrs Grylls and Borlase, until Bull died in 1798 with the question still unsettled. He followed the matter from the court of Common Pleas to the court of Chancery,

six and eight o'clock in the course of 40 years—amounts to 20,000 hours or three years and 121 days and 6 hours, so that it is just the same as if ten years of life were to be added, to which we might command eight hours every day for the cultivation of our minds in knowledge or virtue or the dispatch of business'.

- <sup>1</sup> On 28 October 1816 he noted in the margin of his Journal: 'On reading the above... I find that I have kept perfect Journals for 24 years last past, and have preserved them, and hope to continue them.'
  - <sup>2</sup> He himself held a mortgage of £5000 on Lord Clifford's manor of Tresithney.
- <sup>3</sup> For an account of the profits which Wallis derived from the different parts of his practice, see Appendix III below, which also contains a transcription of one week's entries in his Journal.
- <sup>4</sup> Cf. J. Rowe, Cornwall in the Age of the Industrial Revolution (Liverpool, 1953), esp. chapter III, 'The Years of Conflict, 1775–1800'. Dr Rowe mentions that one of those who challenged Boulton and Watt, Jonathan Hornblower, was driven into the debtors' gaol by the expenses of litigation at this time (*ibid.* p. 109).

and spent much time in London consulting barristers and hearing cases—in 1794, for example, he was in London from January until July, and he was back again for the hearing in the Hilary Terms of 1795 and 1796.<sup>1</sup>

In addition to all this, Wallis devoted much attention to his property in the mines and in land. He was extremely interested in questions about agriculture, and owned a considerable amount of land, some of which he farmed himself, and the remainder he rented to tenants over whom he kept a close watch. He kept a precise record of crops and prices and prospects for the season, and was much given to reflections on the theory and practice of agriculture in Cornwall.<sup>2</sup> He derived a useful income from his lands,<sup>3</sup> but was more deeply involved in the mines, having large shares in many, and owning some of them outright. These were difficult years in the mines, due both to legal disputes, and to the fluctuating prices of tin and copper, and they demanded much care and attention. No one could have been more assiduous or have displayed more anxiety than Wallis, and in a rapidly increasing fortune he reaped the reward of this devotion to detail.

In October 1794 he reflected:

On maturely considering my present situation in the world, I cannot but admire the providence which has conducted me through life. In 1769 I was scarce worth anything, and I had my doubts where to settle for a livelihood. However by mere chance I fixed at Helston and in 1785 I was worth upwards of £20,000.

His professional income suffered during his illness brought on by overwork, but it very quickly recovered, and rose from £560 in 1794 to £2130 in 1804. And in December 1805 he recorded that

- <sup>1</sup> Wallis usually stayed at 131 Strand, and did business for other clients during these visits.
- <sup>8</sup> In 1793, when he was considering farming more of his land himself, Wallis reflected: ''tis impossible to do any good without Norfolk or Suffolk ploughmen and also a Kentish ploughman, as the Cornish husbandmen are only fit for harvest men, and nothing else.'

<sup>8</sup> In 1794 his freehold lands produced £130 per annum, and his leasehold lands £580, and he was anxious to convert them all to leasehold.

<sup>4</sup> The estimated profits from Wallis's business are given in Appendix III below. Seeing the hand of Providence everywhere, Wallis believed that even the loss of income during his illness had been beneficial, since it meant that he was not pestered with suitors seeking his daughter's fortune when it appeared that it was declining. He was thus able to choose a suitable husband, who benefited from an income which quickly increased after Wallis's recovery. See p. 124 below, n. 2.

he had made a clear saving of £13,763 in the preceding six years. Indeed, almost everything he touched turned to gold, and in 1797 he wrote:

Having for three months last past given some attention to business and 'tis wonderful to see how it increases, having during that time got on an average full twenty guineas a week, but should I give way again to business, I cannot refrain giving it more thought and attention than would be consistent with my constitution, which I am well persuaded would be very soon impaired, and therefore perhaps 'twould be better to fly from business than to seek it—but remember that Chancery and Exchequer suits are easily and in general profitably conducted, and 'tis Common Law business that perplexes and requires much attention—conveyancing is pleasant, amusing, and profitable.

A month later he was estimating the relative profits to be gained from his business as an attorney, and from his mining interests, and came to the conclusion that while the income from his business might be more reliable, the present appearances in the mines gave him grounds for thinking that they would yield at least a thousand pounds a year for some time to come. And in addition to this, he added that the exercise he gained in looking about the mines 'will be more conducive to my health, than the perplexing thoughts and agitations of conducting law suits'. On this occasion as on some others, he admitted to some doubts about the life he had to lead as an attorney. His profits from business averaged about £500 a year, but he wondered whether it was worth the anxiety involved.

There is [he wrote] a very great deal of perplexity and uneasiness, and much attention is required in the conduct thereof, and many charges made, which tho' conformable to strict law, yet I hold these charges not to be justified in conscience, and much chicane, with reflections on persons, are absolutely necessary to feed the vanity or rather perverseness of those concerned in law suits, and these proceedings often hurt me when I come to recollect them and all the circumstances attendant thereon in order to complete my Journal.

In January 1796 he had decided that in future he would not engage in business regarding wrecks: the charges for the labours of himself and two clerks for the previous three weeks he reckoned would not amount to £60, and that would be paid reluctantly. This he considered an inadequate recompense, especially as these matters generally terminated 'very unpleasingly'. A similar fastidiousness

in his business had led him to dismiss Mr Pearce Rogers in November 1794. He was, he said,

no service at all to me, he is expensive, negligent, and made up of trifles—will extort from a poor man half a crown and immediately spend a crown, in what can be of no use to him—his sentiments are low, his abilities not sufficient to discover when 'tis for his interest to be liberal, and what is very extraordinary, I scarce ever sent him about any business that he succeeded in—so that I have made up my mind to part with him.

Clearly Wallis was well able to forgo business which would have been unpleasant to him, and he was under no necessity of stirring up trouble for the sake of settling it, in the way that so many of his profession were accused of doing. But however much he might reflect that he was able to live comfortably 'without meddling with trifling troublesome suits, and perplexing myself with a variety of suits and business', he allowed himself no respite, and his income continued to mount. On 31 December 1813 he noted at the end of his Journal for that year: 'Making up, casting and balancing cash account for the year 1813 the Dr and Cr amounts to £33,446, yet not a farthing mistake or omitted, but all perfectly right.'

Other entries in the Journal leave a similar impression of this rather high-minded, and perhaps rather self-satisfied attorney. There are hints of it in his dealings with his clerks. When James Borlase went up to London in November 1805 to get himself admitted as an attorney, Wallis wrote:

He came to me nine years since, when after a short trial 'twas thought his health would not permit him to attend to writing, and he continued to come to the office till 12 November, 1800, when he was articled to me for five years—in the first year he spent his leisure in a fruitless courtship, and the latter three years he has bestowed on the volunteers, of which he is adjutant.

'He writes well', Wallis added later, 'and at times has been a useful clerk to me; is not read in Law (because of time spent with Volunteers) and has retained little theory or practice, however I think will do well in life.'1

Wallis adopted a similar attitude towards the affairs of the nation,<sup>2</sup> his tenants, and to political affairs in the borough of Helston

<sup>1</sup> Borlase apparently practised at Helston. He was made an Alderman in November 1816. For the Borlase family, see Toy, op. cit., esp. p. 593.

<sup>2</sup> Reflecting on the fortunes of England at the end of 1810, Wallis noted that 'she seems to be at peace tho' at war with all Europe, her trade is beyond all example great, and her credit unbounded her funds are very high, and money

during a lively period in its history.1 After holding his manorial court at Trevarno in 1797, he confessed that he was 'much soured and hurt at the innovations made and which have been creeping into use for several years past'. The innovations of which he complained were a much larger consumption of punch and beer, the replacement of 'good beef pudding' by 'geese, turkeys, hams, and other dainties', and the addition of a fiddler, to the entertainments which accompanied the court, 'so that instead of the day being a refreshment to the tenants, it becomes debauchery in every point of view', whereas formerly the 'company broke up in good season and went quietly home to their families'. Wallis was not prepared to countenance this, and decided to miss holding the court for one year, and afterwards to provide the tenants with two shillings to pay for their dinners at a public house, and nothing further.

Until 1813, when he became a freeman, there is not much indication in his Journal that Wallis played any part in the political life of the borough, but he must have been closely aware of what was going on, in the disputes about the charter and about who was entitled to vote, the more so since his partner, Joseph Roberts, was the attorney and election agent to Sir Christopher Hawkins, who headed the opposition to the Duke of Leeds at Helston, and eventually succeeded him as patron.2 Wallis confessed that he disliked the charter of 1774, 'because 'tis unconstitutional and unjust, a gross innovation on the liberties of Englishmen yet I perceive the present opposition thereto is in very slovenly hands, therefore I will not trouble myself any further on the subject'. Two years later, however, in 1815, this opposition had been removed from these 'slovenly hands', and was being managed by Wallis himself. In that year he was up in London, arranging for the presentation to the House of Lords of a petition in favour of the bill inspired by the supporters

very plenty her industry is not equalled and her merchants are very enterprising, her revenues are large her navy equal to all the world combined her sailors full of life and spirit, and their commanders the best informed, zealous and rather too much courage, so as to border on insolence; her soldiers are all heart and her statesmen are learned and some have had much experience and many are patriots, but the struggles between Ins and Outs are contemptible'.

<sup>1</sup> On this period at Helston, and the disputes about the charter and the representation of the borough, see Toy, op. cit. pp. 246-321.

<sup>&</sup>lt;sup>8</sup> Roberts was born about 1779 (Toy, op. cit. p. 303, n. 3). Wallis married Philippa Roberts of Helston in 1771 (ibid. p. 301, n. 3). His wife died in 1807, but Wallis lived until 1826. His daughter Philippa married Captain Joseph Lamb Popham, and carried Trevarno into that family.

of Sir Christopher Hawkins, and which was supposed to 'secure the freedom and purity of elections in the borough of Helston'.

In all this, Wallis is characteristic of the respectable attorney of the end of the century—even in the doubts which may linger in the mind about the complete sincerity of some of his pronouncements. But it is easy, and not always just, to criticise those who are ready to commit themselves in speculations which the more circumspect avoid. If the opinions of Wallis and others among his colleagues sound high-minded, it may mean that their authors were highminded, sharing this quality with men who were having an increasingly powerful effect on their society. Wallis saw clearly what were the better things, approved them and endeavoured to follow them. And when he fell short, it was all confessed in his Journal. He went on buying state lottery tickets—and successfully—after noting that 'gaming is an odious and disgusting passion, which condemns men to ignoble sensations'. He was a devout churchman. and hated the Methodists who 'make a show of sanctity of manners, are certainly devoid of true religion, loyalty or true morality... altogether intolerable in their dealings, advancing the greatest falsehoods in their bargains, and must in every point be guarded against'. He often reflected on the 'mutability of all sublunary things', and time and again recorded his conviction that he had been singled out for divine favour. All his projects prospered, even though he claimed no special aptitude or inclination for them, and almost in spite of himself, 'I am of opinion', he wrote, 'that Providence has thrown mines in my way for some peculiar purpose, as my inclination is much against such adventures, but by some unaccountable ways, I have been led to the mines.'2

The last Journal to survive is that for 1815, and at the end of the year Wallis closed it with these words:

Thus ends the year 1815. O Almighty and Just God of Heaven and Earth, accept my most grateful thanks for thy great mercies bestowed

<sup>&</sup>lt;sup>1</sup> Toy, op. cit. p. 299. Toy seems mistaken in saying that Wallis had not been resident in Helston for twenty years (ibid. p. 307).

In thanking God for his health and prosperity at the end of 1805, he wrote: 'I daily perceive his providential care over me and over all my serious affairs, and I entirely attribute my prosperity to divine protection and tho' my income this year in business is less upwards of £500 than last year, the reason is that I was nearly half the year in London, and there employed on several government matters, for which no gratuity has yet been received, but I doubt not of its producing to me at a future day, twice £500 and make ample amends for the loss of time.'

on me through a long life of seventy-two years, constantly guarded by providential care, and when I trace back all my days, and count the many fortunate events thereof, thy goodness to me appears in every moment thereof and in all my transactions; I beseech thee O Lord for thy protection thro' the remainder of my life in truth, justice, and in a deliverance from evil.

Christr. Wallis,

31 December, 1815.

Such sentiments, recorded by an attorney in his business journal, would probably have come as a surprise to many who had been accustomed to think of the profession as a race of pettifoggers. And if it be pointed out that Wallis, like so many of those seeking to reform the profession at this time, was well able to afford honesty and high principles, it may be replied that this does not make these qualities less meritorious or less beneficial to society. It may mean that, backed by the strong motive of self-interest, they had a greater chance of being generally established.

## 2. WILLIAM HODGSON

The opinions of Christopher Wallis on his professional standards are drawn from the years of his prosperity. To a young man with his career to make, and without any material advantages to begin with, things may well have appeared differently. William Hodgson, the younger brother of Joseph Hodgson, deputy clerk of the peace for Cumberland at the end of the century, spent the early years of his career in London, and the letters he wrote to his brother describe his life as a clerk in the office of a London attorney.

He wrote on 30 January 1795 to say that he had been admitted an attorney by Lord Kenyon the preceding Saturday, and he asked Joseph to employ him from time to time on legal services in London. He had met Garforth, his brother's superior as clerk of the peace, and had been civilly treated by him.<sup>1</sup> Having decided to seek his fortune in London, he wrote:

I went to Messrs Ellison and Nares, Crane Court, Fleet Street, on Tuesday only for trial until the expiration of this term when I'm to enter into pay if we can agree, for as I could not suit myself as to my

<sup>1</sup> John Baynes Garforth, steward and agent to the Earl of Lonsdale, clerk of the peace for Cumberland, M.P. for Cockermouth 1780 and 1790–1802. Garforth did Joseph's agency business in London, so that Joseph could hardly neglect him to feed his brother.

mind and this being a respectable office, I thought it better to be improving myself tho' without emolument for the present than sitting idle at home.<sup>1</sup>

His letter to Joseph in March described the character of his work:

Messrs Ellison whom I'm with have a great deal of all kinds of business, except agency, the conveyancing has been allotted to me, at which I'm kept very tight for this month past, under the eye of Mr Ellison who is a very sulky man, not saying much, but when any of them does anything that does not please him one would imagine from his countenance that he subsisted upon nothing but crab pudding; there is another clerk who takes the Common Law under the inspection of Nares who is a pleasant man enough, but of this branch of the business I expect to have a part ere long. The other four do nothing but copy who are the wickedest dogs I ever met with, consequently I've enough (...)2 keep them under. We are kept very hard at it and (...)2 office is by no means an agreeable one, but with this I can put up, as the variety of business transacted therein must be of very great advantage to me, for I think I've learnt as much since I came to London as I did the whole of my time in Carlisle. I think I could have a more agreeable situation with a better salary but will not be in a hurry to change so long as they behave decently to me, tho' they've had about eight clerks within this year.8

William performed occasional services for his brother, both legal and otherwise, and Joseph was anxious about his financial position, and more than once offered to send money to help him out. But William felt obliged to get along without aid until it was absolutely necessary, being already conscious of a large debt to Joseph. In April he wrote to reassure his brother who had heard rumours that William was unhappy in London.

I recollect telling Mr Jackson when in Town that I was not partial to London, which most certainly is the case, though I'm well enough satisfied, and can live very contented in it; but it is natural to every person at first leaving home to feel somewhat awkward and find a vacuum now and then, though ever so close employed and I'm sure mine is pretty tight, for my leisure hours (which are few indeed) I employ in reading, which daily comes more and more habitual and I feel a secret satisfaction in thinking it no more than a transitory labour in full assurance of receiving the advantage thereof at a future time. It would have been a

<sup>&</sup>lt;sup>1</sup> Hodgson MSS. (Cumberland County Record Office), File H, bdle 16.

<sup>&</sup>lt;sup>8</sup> MS. torn.

<sup>&</sup>lt;sup>a</sup> Hodgson MSS. File H, bdle 16; 16 March 1795.

great benefit to me had I been sent from home sooner for my connections were such as directed my attention entirely from business; and London is the place to learn industry especially when a person has time enough to discover that which is for his own interest; however I must now endeavour to make up here by assiduity in business what I lost in Carlisle by my own negligence.1

For some months, however, William's financial situation seems to have continued to be very precarious. He was doing some legal business on his own,2 and was undertaking some discounting of bills for Joseph, but later he wrote to say that 'A little money would be acceptable tho' I'm not in immediate want, but not from you, as I look upon myself as equally bound to pay you as any indifferent person: therefore if my father should think me extravagant, don't urge him as I can do without it: by your offering me in the manner you have done you only heap more obligations upon me than I shall ever be able to extricate myself from, as all I can do is to thank you for your goodness.'4

But his legal business was evidently not enough to support him, and in June he wrote to his brother about an opportunity of supplementing his income by entering into a partnership with a Carlisle man named Batey in the commission business.

In consequence of your intimating to me before I left the country that if I could get into a concern you would stand my friend and which I have not had the least reason to dispute since I came to this grand Emporium of Revolutions. I now take my pen to address you on that head, to request your friendly advice and assistance, having at present an offer to embark in a concern which if I may judge from appearances holds out the most flattering prospect.<sup>5</sup>

Batey was connected with two Glasgow firms, and had agreed to take him into partnership if he could find £500. He asked Joseph whether he and his father would be prepared to advance this sum, and went on:

I have no doubt we might do very well being careful and industrious and not extending our trade beyond our capital, and without prejudice

- <sup>1</sup> Hodgson MSS. File H, bdle 16; 1 April 1795.
- <sup>8</sup> He hastened to assure Joseph that his masters knew nothing of this, and that on admission he had entered himself as living at a different address from that of Ellison and Nares.
  - <sup>3</sup> Joseph was the Carlisle agent of the Paisley Bank.
  - 4 Ibid. 7 May 1795.
  - <sup>6</sup> Ibid. 17 June 1795.

to my profession; on the contrary it would certainly be the means of introducing business as Batey's connections are extensive and respectable....I cannot think of staying more than this year in my present obscure situation and where I'm to settle next God only knows: I've long been meditating what I am to do, every place is overstocked with our profession.<sup>1</sup>

Joseph and his father seem to have agreed to advance the capital, but on 14 July William wrote to say that further acquaintance with Batey had led him to abandon the plan.

I still continue to conduct all the conveyancing business in the office [he went on] taking part of the common law (but not so much as I wish). I attend all the commissions of bankruptcy we have. Nares and me are all in all, and when I want to go any way he always lets me. Ellison is much the same as he was, only an extraordinary circumstance took place one day last term: by appointment I met him at Westminster Hall, and as soon as the business was done he asked me into a coffee house, gave me a cup of chocolate and bid me take a coach home!!!<sup>2</sup>

By September he was considering giving Ellison a month's notice of his intention to leave, although he had doubts about obtaining another situation. In October he had revised his verdict about Batey, and had agreed to go into partnership with him after all, under modified conditions. Ewing, the Glasgow merchant, had undertaken to pay him £100 per annum for transacting his business here, which I am to be admitted an equal share of on becoming partner. That no advance (or at least very trifling) is to be made, but to be confined solely to executing consignments for the first year. That the business to be transacted and managed under his name if I think proper. That I am to be at liberty to transact my own professional business at my direction, and to apply the rest of my time to the business in the warehouse. That I am to be admitted to an equal share with him. And that I am to be at liberty to withdraw myself from the concern at the expiration of the first or third year. He has taken a warehouse and two rooms ready furnished over it, at £50 per annum (clear of all taxes) one of which I am to have (being a large one) and is to be divided into two, one for a sleeping room and the other for my private business. Such are the outlines of the terms proposed, which I think advantageous to me, for I don't imagine I can spend a year better, than seeing into such business, joined with an opportunity of having a good deal of leisure time for study. I don't say I mean to quit the concern the first year, but supposing I was to do so, I should be in no worse situation than I am at present, on the

<sup>&</sup>lt;sup>1</sup> Hodgson MSS. File H, bdle 16; 17 June 1795.

<sup>&</sup>lt;sup>3</sup> Ibid. 14 July 1795.

contrary better, for I should have a more extensive knowledge of the world and my connections consequently much increased. In my opinion harm cannot well be done, as the £110 certain will cover rent and other incident expenses.<sup>1</sup>

He asked his brother to lend him £40 or £50 to cover initial costs if he approved the plan.

In the meantime, William remained with Ellison and Nares, and went on doing small legal jobs of his own as opportunity offered. In December, however, he wrote to say that he was giving up his connection with Batey, saying that he would prefer to remain where he was 'than rise to fall'. He did not approve of Batey's behaviour, but thought he could leave him without losing his good offices.

At present I am totally undetermined (until I hear from you) what course I must steer. I could 'tis true get a situation tomorrow in an attorney's office, but really I don't think of again assuming that capacity, clerks here not being looked upon as somewhat inferior, but abject slaves. You may perhaps think I should remain here and try for myself by not having full employment it would give scope to idleness, but I may with confidence assert (and without being accused of vanity) that the tenour of my conduct since I came here has been a continued attention to business and study carefully avoiding everything that might lead on to excess or excite my passions to debauchery and intemperance, which I trust I shall have resolution enough and gratitude enough to continue.<sup>2</sup>

On 30 December he assured Joseph that there had been no formal agreement with Batey, and added: 'rather than be a common hack clerk here, I would prefer trying my fortune in another country: not that I dislike work, but I cannot submit to the treatment.' In January he was still undecided as to his course, and did not know whether to take out his practising certificate or not.

Sometime in May he seems to have decided to set up as an attorney on his own account in London, for he wrote to his brother:

I should like to be down at Carlisle Assizes but my prospect seems a little clouded at present, however, I shall with calmness relinquish the idea if business requires my presence here. We are full of electioneering here—my little brass plate has attracted the notice of the canvassers, there has been a set here this morning soliciting my vote and interest for Curtis.<sup>4</sup>

<sup>&</sup>lt;sup>1</sup> Hodgson MSS. File H, bdle 16; 2 October 1795.

<sup>&</sup>lt;sup>1</sup> Ibid. 13 December 1795. <sup>1</sup> Ibid. n.d. (sometime in May).

But his business cannot have been very pressing, and he seems to have spent the summer at Carlisle. He was back in London at the end of October, and early in November he wrote:

My situation at present no doubt is awkward but what can I do? I must rub on until I get to my *Chambers* which are at No 9, Clement's Inn; but I expect to be there in the course of 10 days. You must send all my papers and books of every description—indeed I expected they would have been off before now. The desk and bed send by sea immediately putting into the desk and drawers such books as you think I shall least want, and put the other up in a box and send by the coach. I am in great want of them.<sup>1</sup>

On the following day he wrote again:

If I was only settled in Chambers<sup>2</sup> I think I shall do very well; attention and industry must bring a man through, and though when in the country I was threatened with a relapse of youthful inclinations I hope it is now removed, and sobriety and steadiness filled the chasm which I trust will remain prominent features in your very affectionate brother.<sup>3</sup>

He asked Joseph to send at once certain books which he wanted urgently—Sellon and Impey's *Practice*, the *Modern Pleader*, *Chancery Practice*, Cook's *Bankruptcy Laws*, 'and as many more as will cost no more than 3s.', 4 and asked him to recommend him as agent to the local attorneys and to John Robinson.

By the end of the year William's business was still not enough to take up all his time, and he wrote to his brother suggesting a scheme for helping him in his banking business, which he thought would bring in about £100 a year.

All bills sent here by you [he wrote] if dishonoured are returned through the Bank with about 4% charged thereon, of which you have not one farthing but all the risk. Now if I could raise as a standing stock about £200 and give Smith, Payne and Smith notice that all dishonoured bills bearing your endorsation would be paid by me for your honour it would have a two-fold good attending it, viz. the principal one of pocketing the regular and fair charges and then the bill will reach you two days sooner than usual.<sup>5</sup>

<sup>&</sup>lt;sup>1</sup> Hodgson MSS. File H, bdle 16; 7 November 1796.

<sup>\*</sup> The rent of his chambers was £15 per annum.

<sup>\*</sup> *Ibid.* 8 November 1796.

<sup>4</sup> Ibid. 11 November 1796.

<sup>&</sup>lt;sup>6</sup> Ibid. 26 December 1796. Smith, Payne and Smith were the London agents of the Paisley Bank.

He recommended the plan strongly to Joseph, and said it would be worth while even if it meant borrowing money to supply himself with the necessary capital.

Only a few other letters from William survive. They show him trying still more ways of making money. In 1797 he was selling hams which had been sent to him from Carlisle. The trade was good in July, but flat in September and October. On 24 October he wrote:

The sale for hams is slow, but I keep rubbing on—all the bacon is gone except two hlds[?]—if the hams had been small the difficulty of effecting sales would have been trifling, but on the contrary they are in general great ugly ill-shaped Scotch dogs weighing 50–70 lbs each.<sup>1</sup>

These letters end in 1797. Although they suggest that William's position was still far from secure, and no doubt leave much unsaid about the ways in which he obtained a living, it comes as something of a surprise to find that he is one of the attorneys most savagely attacked by Robert Holloway in his Strictures on the Characters of the most prominent practising Attornies, published between 1805 and 1811.

Mr William Hodgson [wrote Holloway] is a man in whom virtue, modesty, humanity, chaste practice, and amiable endowments are unquestionable; in him nature seems to have erected one of her proudest banners on which is emblazoned all the virtues we meet with in the heathen mythology—all the piety we are taught in the Apocrypha, and the morality bequeathed to the roll of attorneys by the Settlers at Botany Bay!...It is said charity covers a multitude of transgressions:—whether this gentleman's transgressions have any covering at all we know not; but in mercy to decency, it is time they had.

He goes on to accuse him of brow-beating a debtor who was desperately ill, and of writing to him in terms 'such as might naturally have been expected from a baptised wolf. "Is it to me that you come for mercy? Thrust your hand in the fire and pray the flames not to burn you!"

The attack continues in the most violent language, and concludes:

We do not impeach his abilities as an attorney, or his want of assiduity for the interest of his client; and if a little swearing should be necessary, it is no more than what Edw. Barnet,<sup>2</sup> or any other conscientious attorney

<sup>&</sup>lt;sup>1</sup> Hodgson MSS. William Hodgson's Letter Book, 24 October 1797.

<sup>&</sup>lt;sup>2</sup> Another attorney attacked by Holloway.

is ever ready to do for the benefit of his client, and we dare say Mr Hodgson never swore anything extra-judicial, or neglected to make his own affidavit an article in his bill of costs;—we shall only say, we were very lately requested to draw an indictment arising out of a squabble about this gentleman's veracity, which we declined, and we trust our reasons for declining it were such, as will do honour to our liberality, even towards an enemy.—To conclude, we wish Mr Hodgson and men like him to bear in mind, that the most feeble insect that is wantonly trod upon today, may gain strength again tomorrow to sting its oppressor to the heart.

N.B. We understand he has lately taken a partner, and a wife; we sincerely hope the breed at Carlisle, and the practice in Clement's Inn, will both improve.<sup>1</sup>

William survived this blistering attack, and enjoyed long years of prosperity at Carlisle. He became clerk of the peace for Cumberland, an office which was held by his family throughout the nineteenth century. He became a justice of the peace, deputy-lieutenant of the county, and was five times mayor of Carlisle. He died in 1850 at the age of 77 in circumstances very different from those which had surrounded him in his early years as an attorney in London.

<sup>1</sup> Holloway, op. cit. pp. 277 et seqq.

#### CHAPTER X

# THE ROAD TO RESPECTABILITY

In his play Pasquin, first performed in 1736, Fielding wrote:

Religion, law, and physic, were designed By Heaven the greatest blessing on mankind; But priests, and lawyers, and physicians made These general goods to each a private trade, With each they rob, with each they fill their purses, And turn our benefits into our curses.

This was typical of the general belief in the earlier part of the eighteenth century that professional men were merely parasites. They were not engaged in productive labour; they made their living out of other people's misfortunes. The doctors and the lawvers especially, and among them, the apothecaries and attorneys more particularly, were subjected to the almost universal abuse of the satirists and commentators of the time, in plays, pamphlets, and novels. They were quacks and pettifoggers; they exploited the mysteries of their craft for their own ends. What they did for their clients had largely to be left to their own judgment, and this judgment was assumed to be exercised primarily in their own favour. They were expected to be hypocritical, selfish, and cunning, and were liberally abused for doing what was expected of them. It certainly gave a man no special prestige to be an attorney: rather was it a social handicap he had to overcome. Tom Clarke, in Smollett's novel Sir Launcelot Greaves, 'never owned himself an attorney without blushing'.

This does not mean that men of gentle birth are never found as attorneys in this period; Thomas Fane, a Bristol attorney, succeeded to the Earldom of Westmorland. Nor does it mean that a man never achieved gentility by means of the profession. On the contrary, it provided a social stepping stone for a good many people of humble birth. But the profession was merely a stepping stone to gentility in these early stages, and men who had exploited the undoubted possibilities of gain presented by the profession were not usually content to remain attorneys, nor to found merely

professional families. They got into the landed gentry as quickly as they could for their profession as such conferred no particular dignity. Sir Joseph Banks, for example, the President of the Royal Society at the end of the century, owed his social standing to an attorney grandfather who had bought himself an estate and a seat in parliament, which he passed on to his son who was not an attorney.

For those who were not sufficiently prosperous to buy themselves into the gentry there was no escape from the abuse which was hurled at the profession. Much of this was of the type that is habitually reserved for professional men on the grounds that all professions are conspiracies against the laity. Professional men were also attacked in the way that middlemen are often attacked, and as exploiting the complexities of society—in this case the undoubted complexities of the legal system—complexities which they had a vested interest in preserving and augmenting. Certainly the profession offered very real temptations to the unscrupulous, and since so little was expected of it, perhaps its standards were not especially exalted.

They were, in fact, the standards more generally observed in the early eighteenth century. Social commentators of this time found much to complain of, but their attitude towards what they saw was very different from that of later critics: they were satirists, not reformers. Fielding and Hogarth described the contemporary scene meticulously, not without some delight in its chaotic and unscrupulous character. There was not much confidence that anything could be done about it—things were what they were—and if it was to be judged at all, it was by standards which had long been accepted. Nor were there lacking those who considered the social order, like the constitution, to be perfect, and blamed any faults on mankind. They thought that social abuses might be corrected or punished—they could scarcely be cured, and they were more often causes for satirical amusement than for high moral indignation.

Certainly parliament and the judges tried to regulate the attorneys, in the corrective, punitive, fashion of most social legislation of the time, but their efforts met with no very conspicuous success until the attorneys themselves, and society generally, began to demand higher standards of behaviour. In the meantime the popular attitude was one of 'comic toryism' which conceived of society as

<sup>&</sup>lt;sup>1</sup> The phrase is Professor Basil Willey's; see Eighteenth-Century Background (London, 1940), ch. 3.

being static, and of its standards as being fixed. Some, like John Brown, seemed almost to despair of mankind.<sup>1</sup> They believed that selfishness and luxury were rife; they saw no signs of public spirit and few of private morality.

No one believed that attorneys at any rate exhibited either of these qualities. There were perhaps special reasons why lawvers should be abused. Physical ills, which were the source of the profits of the medical profession, were accepted as the lot of mankind, and it was possible to be grateful to those who could alleviate them. The lawyer, on the other hand, was made necessary only by the depravity of men-or of other men-and by the increased complexity and artificiality of society. A defeated client would abuse his own attorney for his ineptitude, and his opponent's for his chicanery. His successful antagonist would resent having to pay for what he believed to be his rights, and would harbour a grudge against his adversary's attorney for having subjected him to unnecessary expense and delay. Further, lawyers were agents and nothing more. They were, in the opinion of many besides Swift, 'A society of men bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid.'2 It was assumed that they were not over-fastidious in accepting cases and clients, or very seriously concerned that justice should prevail. As one writer remarked in 1747, 'Attorney and knave are very near become terms synonymous'.3

The increasing complexity of the laws and the legal system is in some measure an indication of the increasing complexity of society. New situations demand new laws, but the old are reluctantly, and often belatedly abandoned. This has, perhaps, been true in a special degree of England, where the legal system has been based on an historical foundation. The doctrine of precedent and the reliance on case law had become so firmly established as to make English laws a by-word for abstruseness. Not that this was always deplored. Montesquieu considered that the multiplicity of English laws was the price of the Englishmen's liberty. But it afforded ample opportunity for lawyers who wanted to exploit this situation for their own ends. It did not mean that Englishmen did not resent having

<sup>&</sup>lt;sup>1</sup> John Brown was the author of the popular Estimate of the Manners and Principles of the Times, published in 1757.

<sup>&</sup>lt;sup>2</sup> Cf. Junius's belief that the profession was supported by 'the indiscriminate defence of right and wrong' (Letter of 22 June 1769; Bohn ed. 1, 165).

<sup>&</sup>lt;sup>3</sup> R. Campbell, The London Tradesman (1747).

to pay the price of their liberty. Some were dissatisfied with the legal system; many more thought that it was sadly perverted by the lawyers. For all of them, the attorneys provided a suitable target at which to aim their shafts of resentment. They were without professional bodies to defend them, and they did not share the social prestige of judges and barristers.

Elsewhere, declared and statutory law had provided the basis of the legal system: the distinction is between those countries with a common law system, and those in which it is based on the Roman civil law. Some critics thought that codification and simplification were desirable, and that the laws could be made readily understood by all. So long as they remained buried in the Rolls and Case-Books, relevant to the limit of legal memory, so long would the opportunities for legal abuses remain, so long would droves of lawyers flourish. Some, too, tended to overlook the necessarily complex structure of society, and to sigh in vain for a return to a state of rural simplicity, in which neither laws nor lawyers would be required.

These themes can all be discerned in the satirical and critical writing of the period. The adjective habitually—almost inevitably—applied to attorneys was 'pettifogging', one who was not overscrupulous, and given to stirring up trouble in order that he would be employed to settle it.¹ He was described by Ned Ward as 'an amphibious monster that partakes of two natures, and those contrary. He's a great lawyer both of peace and enmity, and has no sooner set people together by the ears but is soliciting the law to make an end of the difference.'² Robert Holloway, later in the century, portrayed many such men in startling colours. Of one of the most notorious of these he wrote: 'Right and wrong claim no distinction but as they severally serve his interest. Justice and injustice have the same convenient quality. His penetration is superior to most men's; the first fee enables him to pronounce the cause just, the second amounts to inspiration, and a third shall

¹ The word has been used in this sense since the sixteenth century. Its origin is uncertain. O.E.D. suggests that it may be a combination of 'petty' and 'fogger', 'fogger' being derived from Fugger, the name of the Augsburg financiers, and used to imply one who used on a small scale the dishonourable devices popularly attributed to great financiers.

<sup>&</sup>lt;sup>2</sup> Quoted at length in J. C. Jeaffreson, A Book About Lawyers (London, 1867), pp. 324-5. See also E. B. V. Christian, Leaves of the Lower Branch (London, 1909), for further strictures of Ned Ward.

decree the client the kingdom of Mexico, if he wants it. Find but money, and he will find title.' Others felt that 'When a lawyer is just, 'tis because he has no temptation to be unjust; that is, where he has so much money to plead the cause of his client, that 'tis out of the power of the other side to bribe him'. Even Johnson, who 'seldom encouraged general censure of any profession', and who was 'willing to allow a due share of merit to the various departments necessary in civilised life', was not above sarcastic reference to members of the profession.<sup>3</sup>

A pamphlet published in 1749 pointed out that in the hands of the lawyers the law was a source of oppression rather than of relief, and was profitable only to the lawyers themselves. 'Some...inferior practitioners not only instigate the unwary to unjust and unreasonable litigations, but, whilst their money lasts, dissuade them from amicable and equitable accommodations; and instead of being peace-makers, are promoting the breach thereof, even among the best united friends.' Existing laws on several matters—bankruptcy and debt were notorious examples—offered wide scope for the chicanery of lawyers, and even the employment of an honest lawyer in such matters was likely to prove an exorbitant expense. The law so bristled with jargon and technicalities that clients could neither control the actions of their attorneys, nor check their bills.'

Such technicalities were not unwelcome, however, when they could be employed to defeat an opponent in the law. Indeed, the *Gentleman's Magazine* went so far as to claim in 1733 that 'The retaining so many strange and undefined and technical expressions in our laws, is not owing to Gentlemen of the Long Robe, as imagined, but to the client, whose avarice, and eager desire of conquest, together with the artifice, ignorance, and knavery of his under-agents, multiply cases, and add to the increase and bulky burden of our laws, and to the dilatoriness of the proceedings in

<sup>2</sup> An Essay in Praise of Knavery (1723).

Boswell, Life of Johnson (Everyman ed.), 1, 393, and 11, 536.

5 Ibid.

6 Cf. Samuel Foote's play The Bankrupt (1773).

<sup>&</sup>lt;sup>1</sup> Letter to John Wilkes, c. 1771. See also Strictures on the Characters of the most prominent practising attornies (1805–11).

<sup>&</sup>lt;sup>4</sup> Animadversions on the present laws of England, etc. This pamphlet is only known to me from a notice in the Monthly Review for 1749.

<sup>&</sup>lt;sup>7</sup> See, for example, Arbuthnot's Law is a Bottomless Pit, ch. IX, and Foote's play, The Englishman returned from Paris (1756), especially Mr Latitat, attorney of Staple's Inn.

our courts'.¹ Some attorneys were assumed to be cynical enough to believe that their clients needed to be impressed with the complexity of the system, lest they should doubt whether they were getting their money's worth, John Bull thought the law 'a pretty science', with 'a prodigious number of learned words', until his wife pointed out that he had paid handsomely for 'every syllable and letter of these fine words'.² And it was clearly special pleading to suggest that 'obscurity and darkness are the darlings of mankind. ... Men may pretend what they please, but they are never pleased, nor part with their money more readily, than when their intellects are puzzled, and their senses reduced to a state of confusion.'³

And if there were too many laws, there were too many lawyers. For, as one critic explained, 'It is not here as in mechanical mysteries, the fewer operators, the more beneficial the operation. Here one makes work for another; experience demonstrating that whenever a lawyer is wanting, peace is undisturbed. Even the catchpole is looked upon as a member, and encouraged, because he brings grist to the mill.' Pettifogging was inevitable since there were far too many lawyers for them all to make an honest living; some indeed would have denied that it was possible to be both honest and an attorney. But some who criticised the excessive numbers were more realistic than others. In the absence of any very stringent or effective regulation of the profession there were undoubtedly many men who practised as attorneys who were in no way fitted to do so. But many complaints ignored the fact that an increasingly complicated society required the services of more and more agents of all kinds, so that comparisons between the unproductive character of the employment of attorneys and the enriching labours of merchants and honest handicraftsmen were becoming less and less apt.5

One critic suggested that there should be councils of commerce in the larger cities to settle commercial disputes, and that suitors in chancery should be given the opportunity of having their costs

<sup>&</sup>lt;sup>1</sup> Gentleman's Magazine, March 1733.

<sup>&</sup>lt;sup>2</sup> Arbuthnot, Law is a Bottomless Pit, ch. IX.

<sup>\*</sup> Law Visions; or, Pills for Posterity (1736).

<sup>&</sup>lt;sup>4</sup> Plain Truth, by way of a dialogue between Truman and Skinall (1736).

<sup>&</sup>lt;sup>5</sup> Similar complaints were heard about domestic servants, 'agents' of another kind, 'drones in the hive, consuming the produce of other men's labour and industry without contributing anything thereto'; see J. J. Hecht, *The Domestic Servant Class in Eighteenth Century England* (London, 1956), p. 178.

settled by two merchants, instead of by a taxing master, that is, by a lawyer.<sup>1</sup> But if the merits of such a suggestion are doubtful, it is clearly a good deal more realistic than that made by another writer much later in the century when he asked

Whether a board or committee of healing and mitigation, between adverse parties to be composed of neighbouring gentlemen, clergymen, sensible farmers and burghers, might not be appointed in every market town and borough throughout the kingdom; a quorum of which might sit for an hour or two every market day, and endeavour to reconcile and compose small differences and misunderstandings among neighbours, and thereby prevent vexatious and expensive suits at law so that those who met in enmity might return to their homes in friendship; to the country's peace, the salvation of families, and the utter disappointment of fleecing attorneys?<sup>2</sup>

It is always possible to believe that problems are capable of solution by simple means if their complexity is ignored, or the effectiveness of regulations is exaggerated. Many ideal solutions to these problems were suggested from the earliest times, but since they tended to be of the type which claimed that the results of the dishonesty of attorneys would be avoided if attorneys were not dishonest, none of them were specially helpful or important. At best they were anachronistic in their proposals. The suggestion made by William Sheppard in 1657 that lawyers should be paid by the state, according to their abilities, and not by fees, which this last pamphleteer quoted with approval, was clearly such an idealistic solution.<sup>3</sup> And while there may perhaps have been grounds for supposing that legal expenses and delays were greater in England than elsewhere, it was probably an exaggeration to say that some nations of Europe 'at this day, carry their code in their pocket, with

<sup>&</sup>lt;sup>1</sup> Animadversions on the Present Laws of England. The same writer maintained that 'The decrease of the number of lawyers would increase our national wealth without diminishing theirs, since they could be diverted to productive employment'.

<sup>&</sup>lt;sup>2</sup> Speculations upon Law and Lawyers (1788). Another suggestion that the number of attorneys in each county should be limited to twelve, and that 'lawyers should be obliged to testify that they thought their clients to have an equitable right to the claims they were making, was condemned by the Monthly Review in 1785. It would only mean that 'the greatest business would be in the hands of the person who possessed the most callous conscience. Like the oaths invented to protect religious establishments, they may sometimes drive away honest men, but knaves never' (A Free Inquiry into the Enormous Increase of Attornies, noticed in Monthly Review, 1785).

<sup>\*</sup> William Sheppard, England's Balme (1657); quoted in Speculations, etc.

the same ease as we our Common Prayer, or Court and City Register', and to imply that England could profitably follow this example. John Corry, writing in 1801, may have underestimated the value of the services which professional men rendered to society, but when he asked himself when the evils of quackery and superstition in medicine and law would be abolished, and answered by saying: 'When mankind prefer temperance to excess, and exercise to indolence, health will be promoted. And when the natural beneficence of the human heart is directed by prudence, men will not involve themselves and their families in want and ruin by law suits', he was probably not over-confident that this millenium was at hand.<sup>2</sup>

Nor had attorneys in the eighteenth century at least any grounds for supposing that such a drastic, and for them disastrous, reformation of human nature was imminent. The frequency of the complaints that whole estates were eaten up by lawyers' fees may equally well be taken as an indication that the English landowner was a litigious animal, as for a proof of the wickedness of attorneys. But those who were prepared to denounce the attorney as the paid and hypocritical agent of other men, prepared to do or say anything for money, did not care to excuse him as an agent merely, and turn their attack on his principal. It was convenient to blame the attorney when anything went wrong, and when it went right, he was not in any special sense praiseworthy: then he was only an agent, then, justice had prevailed. When it was claimed that

A Plaister for a broken head, When made by Law, if 'tis thick spread, Before is healed the outward Sore, Will cost at least Ten Pounds or more<sup>3</sup>

it was apparently forgotten that without the law, the wound might have remained unhealed.

The attorney was used as a scape-goat also by those who found it easier to criticise him than the laws themselves. Just as it was commonly suggested that the constitution was perfect, but that it could be perverted by politicians, so many believed that the laws

<sup>&</sup>lt;sup>1</sup> Speculations, etc.

<sup>&</sup>lt;sup>2</sup> A Satirical View of London at the Commencement of the Nineteenth Century, by an Observer (i.e. John Corry), p. 130.
<sup>2</sup> The Pettifogger, a satire in Hudibrastick Verse, etc. (London, 1723).

allow them to sin with a considerable measure of impunity. 'Now', it was complained, 'every little pitiful tradesman, that can just make up enough money to put his son out clerk, is for making him a lawyer, and consequently as he thinks, a gentleman.' It was people such as these who were responsible for the scandalous practices in the profession, coming as they did 'of some abject, paltry race, born and bred in want, and having but very indifferent principles on the one hand, and pressed by great necessity on the other, they stick at nothing, but do incredible mischief in the commonwealth'.<sup>2</sup>

Many such criticisms suggest that their authors resented the fact that the profession could be used as a means of rising in the social scale, and thus doing violence to the prevailing notions of an ordered, static, hierarchical society. Complaints about those who had 'scraped gentility out of attorney's fees' were at least as old as the seventeenth century.3 The professions were, indeed, one of the most powerful solvents of this traditional structure, but while it persisted, there was some truth in the assertion that those who came from obscure families would be less well educated, more needy, and therefore perhaps less scrupulous than others. Of course there were the exceptional men, 'men of genius and integrity, from whatever class they may have originated', but many shared the view that 'the probability is exceeding strong against a low-bred youth exercising with honour...a profession replete with unavoidable opportunities to harass his fellow creatures'. Attorneys could hardly deny the justice of many of these complaints about their profession; but they were not always fair, and some of the more affluent members of the profession were roused to the only course open to them which was to insist that there were some at least who were concerned for the 'love of justice, the cause of truth, and the honour of the calling', who did not 'debate for fees only',5 and to drive the 'vile and needy pettifoggers' beyond the pale.

By the end of the century much more was expected of the

<sup>1</sup> Proposals Humbly Offered to the Parliament (1707).

<sup>2</sup> Lord what a broking advocate is this?

He was some squir's scrivenor, that hath scrapt

Gentilitie out of aturney's fees;

His bastard actions prove him such a one, For true worth scorns to turn chameleon.'

(John Day, Law Tricks (1608); Malone Society, vol. 87 (Oxford, 1949), act II.)

\* Observations on the Use and Abuse of the Practice of the Law (1786). There are similar complaints in Animadversions on the Present Laws of England (1749).

<sup>5</sup> Speculations upon Law and Lawvers (1788).

profession than had been in Fielding's day. Attorneys appear very frequently in his plays and novels, very much at home in the rough and tumble world he described. Their standards of conduct, like those of the society in which they lived, were low, careless, and devoid of any concern with social responsibility. They, like other men, were individualistic and acknowledged few duties except to themselves. If they were hypocritical, selfish and cunning, this was exactly what was expected of them. Jane Austen's world is very different from Fielding's, and so are her attorneys: so also is her esteem for the professions. For her, a profession provided an opportunity for a man to acquire moral dignity, and a new individual worth. A man owed a duty to society and himself, and his profession was the way in which he could perform it. His worth was proved by his actions, not by his inherited status. Mr Gardiner, in trade at Cheapside, is a more worthy man than Mr Bennett, content simply to enjoy his tenure of an entailed estate, with no thought that he ought to prove that he deserved it. Sir Walter Elliot might be flattered to be told—even by his attorney's daughter —that his face was that of a gentleman, innocent of any of the distinguishing features with which his profession marks a man, but Sir Walter is portrayed as a fool, whose standards of what makes a gentleman are certainly not those of Jane Austen.2

Nor were they the standards which were coming to be insisted on in society generally. Formerly gentility had been inherited: now it was to be earned, and a man acquired it by recognising his duties to society and performing them. This was the keynote of much social criticism in the age of the evangelical revival, and it was powerful enough eventually to influence the whole of society, and to bring about a social revolution of far-reaching importance. The contrast between the old world and the new, in those aspects which most nearly affect this study, is, in brief, the contrast between the system of patronage and influence, and the examination system. There can be discerned a novel concern with individual worth and

<sup>&</sup>lt;sup>1</sup> For a discussion of this, see Lionel Trilling, *The Opposing Self* (London, 1955), p. 215.

<sup>&</sup>quot;Wentworth? Oh! ay,—Mr Wentworth, the curate of Monkford. You misled me by the term gentleman. I thought you were speaking of someman of property: Mr Wentworth was nobody, I remember; quite unconnected; nothing to do with the Strafford family. One wonders how the names of many of our nobility become so common' (Persuasion (1818), ed. Chapman, p. 23). See also Sir Walter's views on the naval profession (the one specially dear to Jane Austen), ibid. p. 19.

tested ability, which in many ways was significant of wider changes taking place at this time.

This new preoccupation with moral worth is shown in many ways. Gentleman was now a title to be earned, and had a specific moral connotation which was absent from the earlier concept which took the possession of coat armour and of inherited landed wealth as its criteria. Of course, certain of the old characteristics remain—and the title still implied a certain economic status. But it came to be accepted that a professional man, even an attorney, could be a gentleman. Gentility had often been obtained in the past through the professions, now it was conferred by them, and enjoyed in them. And, with the example of the judges and barristers before them, a determined effort was made in the last years of the century by a section of the attorneys to get themselves genuinely accepted as gentlemen. In view of the contemporary estimate of the attorney which has been summarised above, their task was a difficult one, but it was made easier by social and economic changes which allowed the development of a large and wealthy body of attorneys, conscious of their common problems as never before, and conscious too that the particular problem which they had to solve was only a smaller version of that which confronted the larger social group to which they belonged.

This social group was the 'middle class', and the way the problem was solved in both cases was by insisting on their 'respectability'. That there had always been a group of people of middling economic importance can hardly be denied, but it is also true that the size and the influence of this group was greatly enhanced by those changes which are summarised as the industrial revolution. And, as they come to realise more and more fully their improved economic position, these people gained self-confidence, became more aware of their common interests and opinions, created their own standards, and stopped looking to the old aristocracy for their rules of conduct. In these years round the turn of the century, the 'middle sort of men' became the 'middle class'—it is then that the term is first used with a more than economic meaning—and it was not long before Brougham was eulogising them as 'by far the most wealthy order in the community...the genuine depositories of sober, rational, intelligent and honest English feeling'. 1 And so soon were

<sup>&</sup>lt;sup>1</sup> Brougham, Speeches (Edinburgh, 1838), 11, 600; quoted A. V. Dicey, Law and Public Opinion in England (London, 1905), pp. 184-5. Cf. Beckford's speech on the 'middling people of England, the manufacturer, the yeoman, the merchant,

they established as a moral force in society that Shelley could attack them in 1820, in words which would often be echoed in periods more commonly associated with class conflict, as a new aristocracy of 'attornies and excisemen and directors and government pensioners, usurers, stockjobbers, country bankers, with their dependents and descendants...a set of pelting wretches in whose employment there is nothing to exercise even to their distortion the more majestic faculties of the soul'.

The standard of morality most commonly associated with this class is that of respectability, 'the state, quality, or condition of being respectable in point of character or social standing'.2 For the middle class, respectability was at once the quality which distinguished them from those they thought beneath them in the social and moral scale, and the claim to recognition which they advanced to the established upper classes. It was, too, an attitude for which they were frequently condemned: in the eyes of men like Melbourne it was nothing more than 'affectation and conceit and pretence and concealment'. Such condemnations are not always just: they are often the country gentleman, they who bear all the heat of the day...', delivered in the Commons in 1761 (Add. MSS. 38334, ff. 29 seq. 13 Nov. 1761), quoted in L. S. Sutherland, 'The City of London in Eighteenth-Century Politics', in Essays Presented to Sir Lewis Namier, ed. R. Pares and A. J. P. Taylor (London, 1956), p. 66). See also, Asa Briggs: 'Middle Class Consciousness in English Politics, 1780-1846', in Past and Present, No. 9 (April, 1956), pp. 65-74.

<sup>1</sup> P. B. Shelley, A Philosophical View of Reform, ed. T. W. Rolleston (London, 1920), pp. 44-6; also printed in R. J. White, Political Tracts of Wordsworth, Coleridge, and Shelley (Cambridge, 1954). Cf. T. J. Hogg, Shelley at Oxford (London, 1904), pp. 79-81. Brougham once spoke of attorneys and pettifoggers in terms very similar to those used by Shelley, and added that 'of all the kinds of labour which some writers have denominated unproductive, the labour bestowed on litigation is perhaps the least beneficial to society' (Edinburgh Review, January 1804. Referred to by John Clive in Scotch Reviewers (London, 1957), p. 141, n. 7).

<sup>2</sup> O.E.D. The earliest use noted is 1785; 'respectable' used to describe persons worthy of respect by reason of moral excellence is dated from 1755: used to describe persons 'of good or fair social standing, and having the moral qualities naturally appropriate to this', it is dated from 1758. Neither word appears in Johnson's Dictionary (1755). 'Respectable' (in any sense) appears in only four out of fourteen dictionaries of various dates between 1730 and 1820, in those of 1737, 1791, 1802, and c. 1814. 'Respectability' is not included until the dictionary of 1820, which quotes it as in use in 1812. 'Respectable' is often used in Boswell's Life of Johnson (1791): 'respectability' rarely.

<sup>3</sup> Quoted from Queen Victoria's Diary for 23 January 1840, by Algernon Cecil in *Queen Victoria and Her Prime Ministers* (London, 1953), p. 77. Melbourne's great-grandfather was a prosperous attorney of Southwell, Notts., and agent to the Coke family. His brother, Peniston, also an attorney, left his fortune to his nephews Robert and Matthew, who also inherited £100,000 from their father.

anachronistic and too general.<sup>1</sup> They ignore, what may be shown from the history of the attorneys, that respectability was a moralising force of immense strength in the civilising of eighteenth-century society, and in the imposing on it of new, necessary, and admirable standards of behaviour—necessary and admirable because they were consonant with the new social structure, as the old were not.

They were ideas which were being canvassed by professional groups other than the attorneys, but in some measure, their activities may be taken as typical of a much wider development. If they were to come to terms with the new structure that was crystallising out of the fluid society of the late eighteenth century, if they were to improve their social status, and avoid all the old abuse which had commonly been their lot, it was clear that they could not secure praise for the deserving without admitting the justice of many of the complaints about the unworthy. This they showed themselves willing to do, and the test they applied was the criterion of the middle classes, that of respectability. A respectable man was one whose affairs would bear looking into, who had nothing to be ashamed of. A respectable attorney was one who could be trusted to put the interests of justice and of his client before those of his own pocket, who would-if only because he could afford to-be fastidious about the sort of work he undertook. He would be concerned for the dignity of his profession, for his own professional character. He would also be jealous of the privileges of the profession, and convinced of the need of professional solidarity. In return for observing high standards of professional conduct, he would expect to obtain the esteem of society. He would certainly have agreed with Adam Smith when he wrote:

We trust our health to the physician; our fortune and sometimes our life and reputation to the lawyer and attorney. Such confidence could Matthew the younger (later Bart.) attorney and steward to the Coke, Salisbury, and Egremont estates, married the sister and heir of G. C. Coke. It was his son, Peniston, who was (officially at least) the father of the prime minister. Melbourne himself was called to the bar in 1804, but gave up any intention of practising on the death of his elder brother in 1805.

¹ The remarks of Sir Harold Nicolson on this point in Good Behaviour (London, 1955), p. 225, seem too sweeping, and to ignore the value of this concept in the process described by G. M. Young as the 'moralizing of society'. Respectability was, moreover, a goal at which all classes could aim, whatever their economic status. On the one hand, the aristocracy itself became respectable; on the other, respectability became the ideal of many sections of the working class. On this last point, see T. R. Tholfsen, 'The Artisan and the Culture of Early Victorian Birmingham', Birmingham Historical Journal, IV, 2 (1954), 146-66.

not safely be reposed in people of a very low or mean condition. Their reward must be such, therefore, as may give them that rank in the society which so important a trust requires. The long time and great expense which must be laid out in their education, when combined with this circumstance, necessarily enhance still further the price of their labour.<sup>1</sup>

It was the aim of many men at the end of the century to secure the general recognition of this opinion.

What success the profession achieved in this attempt is partly explained by the fact that social and economic forces were working in its favour. But a great deal was done by the attorneys themselves to take advantage of these conditions, in the ways that have been suggested. Here it may be emphasised how much was done to secure acceptance of the view that this was a respectable calling, of some use to society, and that some at least of its members were respectable men. This was the burden of much of the pamphleteering; even when it was most bitter and unrestrained it was not against the profession as a whole, but only that part of it whose conduct brought all into disrepute.<sup>2</sup> Some, indeed, appealed to the highest motives of social responsibility, such as the author who published in 1811 An Essay on the Law, being a summary view of the profession of a solicitor in opposition to prejudice and misconception. The author addressed himself to the public as well as to the profession, and it was his hope that by pointing out the real nature of the profession he would help to remove the prejudice which had long existed against it. He insisted that solicitors were an essential part of the legal system of the country, and, for that reason, that their behaviour was of general importance. 'As constituents of one general system of jurisprudence, even the inferior members of municipal law cannot be without their influence on the welfare of society. However pure the fountain, if the streams are tainted, national health will languish.' He admitted that prejudice still existed against the profession, 'though happily decreasing from its prevalence in former times'. The most alarming consequences would follow if this prejudice were not overcome. The profession would be abandoned by all save those with 'vulgar and degraded minds,

<sup>&</sup>lt;sup>1</sup> Adam Smith, The Wealth of Nations (Everyman ed.), 1, 93-4.

<sup>&</sup>lt;sup>2</sup> The motto of Robert Holloway's Strictures on the Characters of the most prominent practising Attornies, was taken from Timon of Athens:

<sup>&#</sup>x27;All have not offended,

Like a shepherd, approach the Fold, and cull th'infected forth: But kill not all together.'

been coupled with the adjective 'pettifogging' as had the term attorney. The pamphlet of 1811 quoted earlier in this chapter uses this term; it was used by Crabbe in *The Borough*: Shallow was an 'able and upright solicitor'. The habit was noticed by Maria Edgeworth in her novel *Patronage*, published in 1814. 'There are no such things as attorneys now in England', one of her characters remarked, 'they are all turned into solicitors and agents, just as every *shop* is become a warehouse, and every service a situation.'

Linguistic affectations of this sort have their historical origin in the attempt of a rising section of the community to establish itself in society, and the concern with self-justification which it implies signifies, perhaps, a lack of self-confidence in face of the traditional order. But when these sections become sufficiently well-established to have confidence in their own judgments and their own standards, they exert an influence outside their immediate sphere. The respectable attorneys gain control of the profession: the respectable classes come to influence society as a whole.

The attorneys were typical too of those sections of the community which were insisting on higher standards of public and private morality: respectability in its limited aspect in the history of the profession has its counterpart in a wider sphere. These are the years of the evangelical revival and of the awful warning from France, in which men were turning from the assertion of rights to the consideration of duties.<sup>2</sup> But the impact of Wesley<sup>3</sup> and of the French Revolution was not alone responsible for this changing outlook. It reflected important changes in the structure of society itself, demanding a different system of social obligations.

<sup>&</sup>lt;sup>1</sup> Also quoted in E. Halévy, England in 1815 (2 ed. London, 1949), p. 21 n. 2. Boswell noted Johnson's amusement at the anxiety of the Society of Procurators in Scotland to be known as solicitors 'from a notion as they supposed, that it was more genteel' (Life of Johnson (Everyman ed.), II, 404). See also Lord MacNair, Dr Johnson and the Law, pp. 57–8. After the Judicature Act of 1873 attorneys were to be known as solicitors.

<sup>&</sup>lt;sup>2</sup> Cf. such books as Thomas Gisborne's An Enquiry into the Duties of the Higher Ranks and Middle Classes in Great Britain, resulting from their respective stations, professions and employments (1794); and A Defence of Attorneys, with reasons for thinking that no attorney who duly considers the present critical situation of his country, or who has at heart the increasing respectability of the profession, will object to be taxed (1804).

Methodists were discouraged from going to law with one another, and Wesley himself had a low opinion of lawyers, more than once intervening personally to discourage 'that villainous tautology of lawyers which is the scandal of our nation'. Cf. Wesley's Journal, ed. N. Curnock 1910–16), IV, 361–2, and VIII, 70.

It is in this period that the middle classes acquire self-confidence. and arouse the antagonism of men like Shelley and Lord Eldon who deplored their irruption into the old structure. It is in this period also that the professions gain self-confidence and begin to put their houses in order. Both the professions and the middle class became conscious of the role they could play in a society which gave freer scope for the exercise of individual talents than the old, in which influence and patronage had counted for more than individual worth, and Chesterfield could congratulate his fellow peers: 'We, my Lords, may thank Heaven that we have something better than our brains to depend upon.'1 Now, Maria Edgeworth could write an entire novel with the purpose of showing 'how some lawvers and physicians may be pushed forward for a time, without much knowledge either of law or medicine, (but how)...on the contrary, others may, independently of patronage, advance themselves permanently by their own merit'.

These people, and the attorneys among them, enjoyed in the last years of the century a vastly enhanced position, and provided a strong bulwark to English society in these dangerous years. They had gained much, and stood to gain much more, so that for the moment their influence was exerted to strengthen society, not to weaken it. All over the country men such as Christopher Wallis, James Wheat, Joseph Hodgson, John Ambrose, and many others about whom less is known, like Charles Simeon's father, 'a wealthy and respectable' attorney of Reading,<sup>2</sup> and Mr Messiter of Wincanton,<sup>3</sup> were among the leaders of local society, a society which they were increasingly able to mould to their will. Halévy quotes a single example of an attorney who was secretary of the Corresponding Society, and suggests that the profession as a whole, because of its lack of social standing, 'had every inducement to

<sup>&</sup>lt;sup>1</sup> Quoted D. Daiches, Literature and Society (London, 1938), p. 141.

<sup>&</sup>lt;sup>2</sup> So described by the Revd. T. Pentycross in a letter to John Thornton, of 28 July 1783, quoted from the *Congregational Magazine* for December 1842, by Charles Smyth in *Simeon and Church Order* (Cambridge, 1940), p. 13.

<sup>&</sup>quot;The most eminent attorney in this county and acquainted with all the monied people in it.... The respectability of Messiter is a circumstance on which I build much as well in my expectations that he will be able to do the business if practicable as that justice will be done your Lordship...' (Revd. S. Rogers to Earl Verney, II August and 30 November 1780, Verney Letters of the Eighteenth Century, ed. M. M. Verney (London, 1930), II, 273). Another example was Caleb Lowdham, a prosperous and well-connected Leicester attorney, and a member of the London and Leicester Pitr Clubs. See W. E. Beasley, The Early History of an Old Leicester Firm of Attorneys (Leicester, 1930).

become a discontented class in revolt against a system which condemned them to a position of social inferiority'.¹ But this study leads to a contrary conclusion, and suggests that the attorneys who were acting as officers in the militia, and as secretaries to Church and King Clubs and Associations for the Protection of Liberty and Property, were more typical of their profession than was John Frost.² Respectability and Jacobinism rarely went together.

It was in the nineteenth century that the professional classes came into their own, and the standards of professional morality which they set were in some measure those which decided the tone of society as a whole. Certainly the epithet 'respectable' is one which was frequently applied to these people, and it was one which many were proud to deserve. For however justly respectability may sometimes be linked with hypocrisy, at this time it represented a valuable and important attitude, which played its part in the process described by G. M. Young as the 'moralizing of society'. The conditions and complexities of the new age demanded new standards and new organisations for those who had its work to do, and it was of some importance that the attorneys and others entered it with these standards clearly before them, and with suitable organisations either already in existence, or at hand.

<sup>1</sup> Halévy, England in 1815, p. 22.

<sup>&</sup>lt;sup>1</sup> John Frost (1750–1842) was educated at Winchester, and became an attorney. He was struck off the Roll in 1797 as a result of a trial for sedition. He was given a free pardon by the Regent in 1813, but a move to have him reinstated as an attorney in 1815 failed, since the 'court held that his want of practice and experience in the profession made him presumably unfit for the employment' (State Trials, XXII; D.N.B.). William Hone, who was sent to an attorney's office in London in 1790 at the age of ten, was removed by his father when he came under the influence of the Corresponding Society, and sent to another attorney in Chatham. He left the law in 1800 for bookselling and publishing (D.N.B.).

<sup>&</sup>lt;sup>8</sup> G. M. Young, Victorian England: Portrait of an Age (Oxford, 1949), p. 4.

#### APPENDIX I

## THE APPRENTICESHIPS OF RICHARD CARRE AND SAMUEL BERRIDGE

RICHARD CARRE was articled to Thomas Wright and Francis Sitwell, attorneys at Sheffield in the early part of the eighteenth century. His Day Book, which is preserved at Sheffield, gives a detailed picture of his life as an articled clerk in the period 1724–30. It begins appropriately enough on 2 December 1724, 'Engrossed a deed', for this seems to have been one of his principal occupations, together with that of attending his master on his business journeys, especially to hold manorial courts, and to enter indentures of apprenticeship at the Hall of the Cutlers' Company in Sheffield. At sessions time he went with him to Doncaster, York, Rotherham, and Chesterfield. He was sent to Wakefield to buy stamps, he issued subpoenas, collected rents, and when there was no work of this kind to be done, he occupied his time in copying out precedents, or reading from such current legal manuals as Giles Jacob's Common Law Common Plac'd.

Carre's masters seem to have taken the task of training him very seriously. The main purpose of the Day Books seems to have been to act as a sort of check on his activities, and may perhaps have served as documentary evidence of his diligence—or lack of it—during his clerkship, and have been produced for the inspection of the judges when he was seeking admission. This at least seems to be the meaning of the various marginal comments added in a hand different from that of the main body of the text, and which is presumably that of the master.

On 31 January 1726/7, the clerk notes, '12 sheets of Bradesford's answer—Bradesford had not the skin till almost noon'. Beneath this is written in a different hand, 'This is the engrossment of the answer and is 39 lines of the skin and is but 10 sheets of the draft and 2 lines though here it is said 12, these sheets are very wide and there happens to be a sheet or more of the 10 struck out, but however all this should have been done in less than two hours and

better done than it is done'. On 6 April 1727 Carre writes: 'Finished Swynson's writ'; to this is added the comment: 'Although you have writ that Swynson's writ is finished I find it is not, let there be a fourth copy made, and stay in your office from 8 in the morning till noon and from 2 to 7 and see if business cannot be better minded. If it be not I must at last come....' This has been heavily scored through, so that the last words are indecipherable; perhaps the clerk was anxious that those looking over his book should not be able to read his master's strictures on his behaviour.

Between the entries for 11 and 12 July 1727, the master had written: 'Friday 14, 10 in the morning I find nothing entered to be done of Wednesday and Thursday and he lay out of my house last night and not yet come in.' On 8 May the master noted: 'Although I required every night you should enter what you had done that day here is nothing done in my absence since Wednesday the 3rd.' On 17 July Carre claimed to have copied out a conveyance, but his master noted: 'At 10 o'clock of Monday night there was not a sheet of this conveyance copied, and he not in when the doors were locked....' Again the remainder has been scored through too heavily to be legible. Some days afterwards Carre noted that he had nothing before him to do. On such occasions he might be employed in running errands for Mrs Wright.

On 3 February 1727/8, Carre went up to London with Sitwell, and returned to Sheffield on 21 March. The details about this visit are not recorded in the Day Book, but are apparently given in a note book preserved at Renishaw Hall. He travelled, wrote Sir George Sitwell, 'Carrying the portmantle and mail leather bag strapped with rings and staples on the saddle behind him'. Both travellers carried a pair of pistols. Once in London, the clerk was kept busy with the legal business of the visit which was entrusted to him, while his master did the more important work, and paid social calls on his relatives. He was 'kept busy running about between the King's Bench, the Green Seal Office, Register Office, Custos Brevium Office, King's Silver Office in Brick Court, Alienation Office, Cursitor's Office, Chirographer's Office, Return Office, Warrants of Attorney Office, and so forth'.<sup>2</sup>

On his return to Sheffield the Day Book begins again. On 10 July he records that he 'read several trials for High Treason, not

<sup>&</sup>lt;sup>1</sup> G. R. Sitwell, The Hurts of Haldworth (Oxford, 1930), ch. xv, p. 267.

<sup>&</sup>lt;sup>3</sup> *Ibid.* p. 269.

having any other book to inform myself in', and on 22 July, 'Had nothing before me and read all day in Bridall's works upon conveyances to the 32nd page'. On 29 August he was 'with Mr Sitwell at Town taking the Master Cutler's account and afterwards at the Feast'.¹ On 25 September he spent the morning making a fair copy of a will, and attended the school burgesses feast in the afternoon. He kept an account of all the money spent and received by him on his master's account—payments for letters, stationery, rents and fines received at manorial courts.²

In the same collection at Sheffield is another Day Book which seems also to have been Carre's. Apart from the single note saying, 'lay out of my house a second time...', there are no more strictures on his behaviour, but he still had to account for himself, and still noted the books he had been reading. These included the Compleat Attorney, the Statute Laws, Littleton's Tenures, Nelson's Justice of the Peace, Brown on Fines, Common Law Common Plac'd, and the Guide to the Conveyancer. He read up such subjects as baron and feme, settlements and removals, and the practice of the ecclesiastical court. On one occasion he was able to put his legal knowledge to his own use. 'I October 1729. Went over to my mother's to inquire and meet people who were about presenting a watercourse belonging to her when having produced and examined our witnesses, convinced them of their error. 8 October, went about 3 miles about a little business of my own with master's leave.'3

Samuel Berridge was articled to William Leigh a solicitor of Bardon, near Taunton, and the correspondence between Leigh, Samuel's father (a Leicester attorney), and a friend of both parties, Mr Huxtable, a master at Rugby School, in 1820, illustrates the conditions under which Leigh's articled clerks lived.<sup>4</sup>

On 19 April Leigh wrote to Huxtable:

... I have always been very particular upon such occasions which the peculiar situation and circumstances of my home and family in which my clerks are more than ordinarily inmates and part of the society render more than usually requisite; and as in January last I articled my own son...it is become more essential to my comfort to be very cautious

<sup>&</sup>lt;sup>1</sup> Sitwell was Clerk to the Cutlers' Company.

<sup>\*</sup> T.C. 385.

<sup>&</sup>lt;sup>4</sup> These letters are printed in W. E. Beasley, *The Early History of an Old Leicester Firm of Attorneys*, 1767–1865 (privately printed, Leicester, 1930), pp. 24–7. I am most grateful to the Leicester City Librarian for sending this book to Cambridge for my use.

in the selection both as my two articled clerks will be so young in the office at the same time, and as I would not for any consideration on earth introduce to the society of my son a young man in the least degree likely to set him a bad example upon any one point, as he is in himself, I am most thankful to say, as well disposed a youth as can possibly be. I will therefore enter at some length into my views. I have been led to think not only that a very good classical education is necessary for the profession.... My clerks work very hard and we do not know the meaning of 'office hours'. All hours within which I want them are office hours.... My articled clerks must look up to and respect my highly respectable managing clerk, Mr Rowcliffe, whom I have brought up and who has been with me upwards of 14 years. My writing clerk is as good a lad as can possibly be; we never hear of a dog or a gun. Business and study fill up the hours here. The situation and peculiar circumstances of my family prevent my taking any young gentleman who is not of the Established Church. My terms are 600 guineas, and my clerks pay for their washing out of the house, and I always stipulate...for obvious reasons that in the case of sickness the clerk should be provided with lodging and attendants as well as medical assistance by his father. You do not mention the age of the young gentleman...and as the distance is too great to propose an interview, which I have always wished, as so much depends upon the manners of the young gentleman and the way in which he has been brought up, and as my clerks are certainly cast with the best society in the neighbourhood, I trust it would not be considered indelicate towards either you or Mr Berridge that I make these general inquiries, that the reasons into which I have thought it best to enter so fully, necessarily will require my having most satisfactorily answered; at the same time I shall be happy to hear from you whether you think your young friend will answer the description I have endeavoured to give of what I wish my clerks to be.

On 27 April Mr Berridge wrote to Huxtable approving these conditions—except the 600 guineas which he wanted reduced to 500—and said, '...he requires no more as to character and conduct than every gentleman similarly circumstanced ought to do'. He added that his son would 'be 16 on 22 May next and from his infancy was taught to revere the King and the Established Church'. These conditions were eventually agreed to. Samuel was told to write to Leigh sending a specimen of his handwriting, and Leigh wrote that he thought it would develop into a good business hand, but that he regretted that the young man was not acquainted with law hands. When the period of articles was over Samuel returned to Leicester and became a partner in his father's firm.

#### APPENDIX II

#### THE ADMISSION OF AN ATTORNEY

In his Memoirs William Hickey describes very vividly the way in which he was examined and admitted as an attorney before leaving London for Jamaica in 1775. Mr Justice Yates, one of the judges of the Court of King's Bench, and an old friend of his father's, had promised to sign the fiat. He invited Hickey to breakfast so that he could be examined as to his being 'equal to the practice of an attorney', and was told to send his articles in advance to Yates's clerk. Hickey goes on:

At the time appointed I attended, and in a terrible fright I was at the ordeal I imagined I had to pass through, and the probable loss I might be at in answering some of the many questions I understood would be put to me upon points of practice. Being conducted into his parlour where the breakfast things were all arranged, in five minutes the Judge entered. We sat down, and he recommended his French rolls and muffins as of the best sort, but so predominant were my fears about the dreaded examination that I had no inclination to eat. Breakfast being over, he asked me how I liked the Law, how long I had been out of my clerkship, and two or three other questions equally unimportant, when a servant entered to announce the carriage being at the door, whereupon he desired his clerk to be called, upon whose appearance he enquired whether Mr Hickey's Certificate was ready. The clerk having it and other papers in his hand, the Judge took it from him, and after perusal subscribed his name, and then said, 'Now, Mr Hickey, if you will be so good as to accompany me to Westminster Hall, I will get you sworn, and the business concluded.' I accordingly stepped into his coach which conveyed us to Westminster, and immediately going into Court, where he had taken his seat upon the Bench, the proper officer was asked whether he had the roll, and answering in the affirmative my Certificate was delivered to him and read as was also an affidavit of my Master Mr Bayley's. This being done the Judge ordered the oaths to be administered to me, after which, and my subscribing my name to each, I was entered upon the Roll as an attorney, and making a respectful bow to the Bench and the Bar, I retired, most agreeably relieved from my apprehensions respecting the various interrogatories I had expected would be put to me on the subject of my qualifications.

<sup>&</sup>lt;sup>1</sup> Memoirs of William Hickey (London, 1913), I, 331-2, also quoted Holdsworth, History of English Law, XII, 62.

#### APPENDIX III

# CHRISTOPHER WALLIS: NOTES FROM THE JOURNAL

#### I. ESTIMATED PROFITS FROM BUSINESS

25 December 1793–25 December 1794 25 December 1794–25 December 1795 1797 1798 1799	£ 560
1797 1798	£ 580
• •	£ 722
1700	£ 750
-177	£ 800
1800	£ 823
1801	£1800
1802	£1930
1803	£1970
1804	£2130
1805	£1610

To these sums were to be added his profits from rents and mines. In the six years ending in December 1805 he estimated that he had made a clear saving of £13,763.

More detailed accounts of his professional affairs are given for certain years.

£ 50
£ 50
€ 40
£, 40
£,120
£ 60
£, 60
£ 30
£ 30
£, 26
£, 20
£120
£646
£154
£800

### 1804

1804	
Lord Arundell's business	£,200
Annuities	£,200
Conveyancing	£,150
Commissions on sales	£,100
Mr Rowe's assignments	£300
His business	£400
Ships and Cargoes	£ 50
Exchequer	£ 30
Conveyancing	£ 80
Fines etc.	£ 50
Chancery	£ 30
Law	£300
Ecclesiastical Courts	£100
Attendances	£100
Parish business	£ 40
	£2130
1805	
Lord Arundell's business	£,100
Annuities	£,100
Conveyancing	£,100
Commissions on sales	£300
Mr Rowe's business	€ 50
Ships and Cargoes	£250
Exchequer	£100
Conveyancing	£ 50
Fines etc.	£ 20
Chancery	£ 30
Law	£300
Ecclesiastical Courts	£ 50
Attendances	£120
Parish Business	£ 40
	£1610
	~

#### 2. AN ATTORNEY'S WEEK

## 1796 Sunday, 27 March

Easter. Set off this morning in the Royal Caroline Diligence for Exeter and Bodmin. Breakfasted at Oakhampton, dined at Launceston, slept at Bodmin. At Bodmin and there attended Miss Fr. Harme and consulting about the claims made on her estate by the widow of the late Mr Jno. Harme and about the suit between her and Mr Mountsteven, etc. Slept at Bodmin. Bed at 11. Wind N.W. some snow and cold.

#### APPENDIX IV

### A NOTE ON NUMBERS

IT was a frequent source of complaint that there were too many attorneys, so that pettifogging practice was inevitable. It is obviously impossible to estimate how many attorneys would have been sufficient for any district, but it may be suggested that the figures put forward by the critics of the profession were generally too low. and failed to take into account the growing complexity of English society. The returns made to the House of Commons under the 1720 Act stated that there were 2236 attorneys of the Court of Common Pleas, 803 of the Court of King's Bench, and 1700 solicitors in Chancery. These figures, however, are probably not accurate, and they do not take account of the fact that many men were accredited in all three courts. Some information is available in the various town and county directories, but, again, this is hardly reliable as to numbers. The Law Lists do not begin until 1775, and these too, in the early stages, are obviously incomplete, omitting many attorneys, and containing the names of some who were not on the Roll. Browne's Law List was replaced by Hughes's in 1798. John Hughes was an official of the Stamp Office, and had access to the returns made to that office under the act of 1785 which introduced the annual practising certificate. The volume for 1798 is clearly incomplete, but by 1800 these lists, in so far as they tally with the Stamp Office returns, are the most accurate source available for names and numbers of attorneys. In the lists that follow, the numbers of attorneys in certain towns are given for the years 1790 and 1800. These figures are derived from the Law Lists, and I am grateful to the council of the Law Society for letting me examine these and other volumes in their library in Chancery Lane. The towns selected were not chosen with any special purpose in mind; they are merely the towns for which, for one reason and another, I happened to want this information.

	1790	1800
Bath	24	31
Berwick	9	7
Beverley	10	7

	1790	1800
Birmingham	40	44
Bristol	Ġ1	71
Cambridge	15	16
Carlisle	15	11
Chelmsford	5	4
Chester	29	34
Chesterfield	10	9
Cockermouth	7	4
Colchester	10	15
Gisborough	I	4
Helston	9	7
Hexham	10	5
Hull	16	20
Knaresborough	8	5
Leeds	26	23
Lincoln	13	12
Liverpool	68	76
London <sup>1</sup>	c. 1755	
Malton	I	7
Manchester	40	61
Nantwich	11	5
Newcastle under Lyme	12	12
Newcastle upon Tyne	29	25
North Shields	6	7
Northwich	6	3
Norwich	32	33
Pickering	I	2
Prescot	5	3
Salisbury	22	15
Scarborough	9	5
Sheffield	II	19
Stockport	7	11
Sunderland	11	10
Warrington	9	10
Whitby	7	2
Whitehaven	14	5
Wigan	6	6
York	20	38

<sup>&</sup>lt;sup>1</sup> E. Halévy, England in 1815, p. 21 n. 2, quotes Gneist, Verfassungs- und Verwaltungsrecht, vol. I (Berlin, 1857), p. 509, as giving the number of solicitors in London in 1800 as 1800, and in the provinces as 3500.

#### APPENDIX V

## THE PROFESSIONS IN THE EIGHTEENTH CENTURY: A BIBLIOGRAPHICAL NOTE

Some support is given to the conclusions reached in this work by other studies of different professions in the eighteenth century. In his unpublished Fellowship dissertation on the English Parish Clergy, 1660-1800, in the Library of Trinity College, Mr P. A. Bezodis describes the development from the position in which the country clergyman was a man of no social prestige, when there was a great and almost impassable gulf fixed between him and those who occupied the high places of the Church, to the point at which, although vast economic and social differences persisted, yet all were conscious of belonging to a single professional body, and when they were more liable to be criticised for neglecting the duties of the cloth than for being socially pretentious upstarts. Dr B. M. Hamilton, in her London Ph.D. thesis dealt with the Medical Professions in the Eighteenth Century. (The results are summarised in an article in Economic History Review, 2nd series, IV.) She discerns two strands in the development among the doctors, a revolution in medical training, and a growth of professional feeling. She writes:

As a result of these two movements and of the great expansion of the middle classes, by 1800 the professional scene of a hundred years before had been completely transformed: the apothecaries, once mere tradesmen and the 'servants of the physician', had become practising doctors; the surgeons had dissociated themselves from the barbers, and the 'pure' or hospital surgeon had become a specialist of high reputation; whilst the physicians, originally few in numbers and of a good social position, had received an influx of hard-working middle-class graduates from Leyden and Edinburgh. All types met in the wards of the London and provincial hospitals. Professional honour, etiquette and status were now matters of the liveliest debate, and by the end of the century a man could achieve social standing as well as reputation through his profession. In 1660 a physician was a gentlemen, while apothecaries and surgeons were mere craftsmen: by 1800 it is possible to see them all as part of the new professional classes.<sup>1</sup>

<sup>&</sup>lt;sup>1</sup> Econ. Hist. Rev., loc. cit. p. 141.

These conclusions were underlined in Dr C. E. Newman's Fitzpatrick Lectures for 1954, which, though mainly devoted to the nineteenth century, described the growth of professional solidarity and professional societies among the physicians and apothecaries, and showed the aims and achievements of the apothecaries to be very similar to those of the attorneys.

There are no comparable studies of the other professions in this period, but there are suggestive comments in such work as has been done. Technical, as opposed to, or in addition to, social qualifications, were beginning to be demanded in the army and the navy. (Cf. Norbert Elias, 'Studies in the Genesis of the Naval Profession', British Journal of Sociology, I (1950), 291-309; M. A. Lewis, England's Sea Officers (London, 1939); H. W. Richmond, 'The Navy', in Johnson's England, ed. A. S. Turberville (2nd ed. Oxford, 1952), I, 39-65; E. Robson, 'Purchase and Promotion in the British Army in the Eighteenth Century', History, XXXVI, nos. 126 and 127 (1951), 57-72; Sir John Fortescue, 'The Army', in Turberville, op. cit. I, 66-87.) The Royal Military Academy at Woolwich was founded in 1800, and the Military School at High Wycombe in 1802, under the inspiration of the Duke of York, but these were only first steps, and the name of the Duke of York cannot be called to mind without thinking also of Mary Anne Clarke.

The growth of professional feeling and of professional societies among architects was noticed by H. M. Colvin in his Biographical Dictionary of English Architects, 1660–1840 (London, 1954). 'Architecture', he wrote, 'had become a reputable and remunerative occupation which the professional man could view with favour for his son—one which no longer depended on the uncertainties of aristocratic patronage or the doubtful devices of speculative building. The architect had at last taken his place alongside the doctor and the lawyer, and it would not be long before he began to formulate his own standards of professional conduct and to create an organisation through which they could be enforced.'1

The growth of the banking profession had recently been described by Dr L. S. Pressnell in his Country Banking in the Industrial Revolution (Oxford, 1956). The works of A. S. Collins on Authorship in the Age of Johnson (London, 1927), and The Profession of Letters, 1780–1830 (London, 1928), consider the improving status

<sup>&</sup>lt;sup>1</sup> Colvin, op. cit. p. 15; see also p. 25.

of authors. The examples of Garrick and of Reynolds did much to enhance the position of actors and artists.

Many of these conclusions are summarised by Professor Edward Hughes in his article on 'The Professions in the Eighteenth Century', in *Durham University Journal*, new series, XIII, ii (1952), 46–55, and the part played by the professions in one part of England is described in chapter III of his book *North Country Life in the Eighteenth Century* (Oxford, 1952).

These studies suggest certain significant similarities, but there are important differences, due to the differing natures of the various professions. Only in the case of the legal and medical professions did the actual ability to perform certain professional functions have a very significant effect on the rewards which were obtained; only in these cases was there an accepted body of technical knowledge which would make it possible for professional ability to be tested and even here the opportunity was not fully exploited. The other professions—the army, the navy, the church—were more naturally spheres in which the patronage system worked, and increased. None of those who practised in these fields were under the necessity of the doctors and the lawyers of attracting clients by their individual qualities. In all three cases a certain number of vacancies existed. so that it was natural that in these professions men were appointed to certain places, than that they carved out careers for themselves. But there were signs that even here the position was changing, and that new conceptions of the duties of such men, as well as the new needs of society—such influences as that of Wesley on the idea of a clergyman, and the urgent needs of the Napoleonic wars on the military profession, are of importance—are pointing in the general direction of professional advancement on the basis of proved ability alone. That professional men should also be gentlemen had been clearly enough accepted in the cases of the army and the navy: the story here is of the process by which it ceases to be the only qualification insisted on. In the case of the clergy the process is in some ways reversed—the clergy come to aspire to gentility, and gentility in a clergyman comes to be insisted on by patrons and by society, perhaps to the neglect of professional qualifications and aptitudes.1

<sup>&</sup>lt;sup>1</sup> Theological colleges for the training of clergymen were founded in 1839 at Chichester, in 1840 at Wells, and in 1854 at Cuddesdon, but some concern was felt about the matter before this. See W. O. Chadwick, *The Founding of Cuddesdon* (Oxford, 1954).

Commenting on William Hutton's assertion in 1780 that 'Every man has his future in his own hands', Professor Ashton has said: 'That, it is needless to say, has never been true, or even half true: but anyone who looks closely at English society in the mid- and late eighteenth century will understand how it was possible for it to be said, for at this time vertical mobility had reached a degree higher than that of any earlier, or perhaps of any succeeding age.'1 The professions were important factors in this 'vertical mobility', and one of the main ways in which the old society with its emphasis on 'status' was broken down. Professor Pares has suggested that 'The enormous growth of the organised professions (is) perhaps the greatest change in the whole of modern history', and Professor Woodward has spoken of the professional classes of mid-Victorian England as 'perhaps the most important new social phenomenon of the age'. The professions are important in two ways, for, apart from serving as a sort of social ladder, they are examples of social organisations in which individual merit must necessarily count for more than inherited status, and their history is, therefore, doubly important for understanding the differences between eighteenth and nineteenth-century England.

<sup>&</sup>lt;sup>1</sup> T. S. Ashton, The Industrial Revolution (Oxford, 1949), p. 17.

<sup>&</sup>lt;sup>2</sup> R. Pares, George III and the Politicians (Oxford, 1953), pp. 16-17.

<sup>&</sup>lt;sup>8</sup> E. L. Woodward, '1851 and the Visibility of Progress', in *Ideas and Beliefs* of the Victorians (London, 1949), p. 61.

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1298 Cash Book, 1787-8

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